313

FILED
MAR 11 1941
CHARLES ELMORE CROPLEY
CLERK

In The

Supreme Court of the United States

October Term, 1940

No. 834

CITIES SERVICE OIL COMPANY,
Petitioner

vs.

B. P. DUNLAP, ET AL,
Respondents

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Supporting Brief

CLAYTON L. ORN,
Fort Worth, Texas,
DAVID B. TRAMMELL,
Fort Worth, Texas,
Attorneys for Petitioner.

A. M. EBRIGHT,
HAYES McCOY,
Bartlesville, Okla.,
H. J. PATTERSON, Austin, Texas,
PHILLIPS, TRAMMELL, ESTES,
EDWARDS & ORN, Fort Worth, Texas,
Of Counsel.

FORT WORTH BRIEF PRINTING CO., 208 1-2 W. 12TH ST. 2-4070

INDEX

Pages

PETITION FOR WRIT OF CERTIORARI

Opinions of this court and court below 1-2
Preliminary statement 2-3
Summary and statement of the matter involved 3-10
Statement of grounds on which jurisdiction is invoked 11-15
Questions presented 15
Reasons relied on for allowance of writ 15-20
Conclusion 20-21
Signature of counsel and certificate 21

SUPPORTING BRIEF

Opinions of this court and court below 1-2
Statement of grounds on which jurisdiction is invoked 11-15
Statement of the case 2-10
Specifications of the assigned errors 24-26

Argument 26-71

I. *Calls for adjoinders override distances after the rights of a bona fide purchaser have intervened* 26-32

II. *Calls for adjoinders created in a partition are as conclusive and controlling as calls for adjoinders that existed prior to the partition* 32-38

III. *Calls for adjoinders in a partition deed are conclusively presumed to include all the land owned by the co-tenants unless a portion is expressly excepted* 38-39

IV. *There was no latent ambiguity in the partition deed* 39-49

V. *The Texas authorities cited by the Circuit Court are not applicable because they do not involve the construction of deeds after the rights of bona fide purchasers have intervened* 50-52

VI. *Texas presumes that a party does not intend to retain long narrow strips next to one of his*

INDEX—Continued

Pages

lines if the courses and distances approximate closely to the line and are the same courses and distances as given in the chain of title 53-54

VII. *Course controls distance and a deed is not latently ambiguous because of a conflict between courses and distances* 54-55

VIII. *Parol evidence is not admissible to prove surveyors set objects not called for in the deed when their location conflicts with the called adjoinders; especially after the intervention of the rights of a bona fide purchaser* 55-56

IX. *Title to the 66 foot strip passed to J. F. Rogers and petitioner subject to the easement since respondents pleaded the strip was being used for road purposes at the time of the partition and it was not expressly excluded in the description* 56-70

X. *Federal Courts follow State Courts on construction of deeds and rules of evidence* 70-71

Signature and certificate of counsel 71

AUTHORITIES

TABLE OF CASES

Amerman v. M. K. & T. Ry. Co., 182 S. W. 54 (writ ref.) 14, 20, 62, 69

Bell v. Preston (Tex. Civ. App.), 47 S. W. 375 ..... 13, 18, 36
Bolton v. Dyck Oil Co., 114 S. W. (2d) 299 62
Booker v. Hart, 77 Tex. 146, 12 S. W. 16 ..... 13, 18, 36
Bowers v. Atchison, T. & S. F. Ry. Co., 119 Kan. 202, 42 A. L. R. 228, 237 Pac. 913 64
Brooks v. Slaughter (Tex. Civ. App.), 218 S. W. 632 ..... 13, 18, 36
Bruner Fire Co. v. Payne, 118 S. W. 602 68

Cantley v. Gulf Production Co., 118 S. W. (2d) 448, aff. — Tex. —, 143 S. W. (2d) 912 ..... 14, 20, 58, 60, 62, 69

AUTHORITIES—Continued

Pages

City of Springfield v. Eisenmeyer (Mo. Ct. App.), 297 S. W. 460 64
Cox v. Campbell, — Tex. —, 143 S. W. (2d) 361 ..... 14, 20
Cross v. Talbot, 121 Ore. 270, 254 Pac. 827 ..... 64, 65

Durbin v. Roanoke Bldg. Co., 107 Va. 753, 60 S. E. 86 64

Emerson v. Bedford, 51 S. W. 889 (writ ref.) 69
Erie RR. Co. v. Tompkins, 304 U. S. 64 11

Florida Southern Ry. Co. v. Brown, 23 Fla. 104, 1 So. 512 64
Ford v. McRae (Tex. Com. App.), 96 S. W. (2d) 80 3

Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69 ..... 11, 13, 18, 19, 26, 32, 33, 43, 45, 50, 52, 55
Grant v. Moon, 128 Mo. 43, 30 S. W. 328 64
Guadalupe Co. v. Poth, 163 S. W. 1050 62
Gulf Production Co. v. Baton (Tex. Civ. App.), 108 S. W. (2d) 960 ..... 12, 19, 38
Gulf Production Co. v. Warren, 99 S. W. (2d) 616 (writ ref.) 62
Gulf Sulphur Co. v. Wyman, 221 S. W. 310 ..... 62, 63

Hardin v. Jordan, 140 U. S. 371 11
Hays v. Clawson (Tex. Civ. App.), 286 S. W. 857 (writ dismissed) 14, 19, 56
Hines (Edward) Yellow Pine, Trustees v. Martin, 268 U. S. 458 71

Johnson v. Archibald, 78 Tex. 96, 14 S. W. 266 ..... 50, 51

Kuhn v. Fairmont Coal Co., 215 U. S. 349 70

Lewis v. East Texas Finance Co., — Tex. —, 146 S. W. (2d) 977 ..... 40, 61
Livingston Oil & Gas Co. v. Shasta Oil Co. (Tex. Civ. App.), 114 S. W. (2d) 378 (writ dismissed) 4, 16, 53, 54, 55
Longoria v. Shaffer, 77 Tex. 547, 14 S. W. 160 ..... 13, 18, 36
Loud v. Brooks, 241 Mich. 452, 217 N. W. 34 69

Maddox v. Turner, 79 Tex. 279, 15 S. W. 237 36

AUTHORITIES—Continued

Pages

Magnolia Petroleum Co. v. Caswell, 295 S. W. 653; reversed on other grounds 1 S. W. (2d) 597 ..... 63, 64
Mason v. United States, 260 U. S. 545 71
Massachusetts v. New York, 271 U. S. 65 ..... 11, 70
Miller v. Lemm, 276 S. W. 211 50
Merchants v. Grant, 26 Cal. App. 584, 147 Pac. 484 64
Miller v. Southland Insurance Co. (Tex. Civ. App.), 68 S. W. (2d) 558 ..... 11, 12, 13, 18, 19, 40, 51, 52, 55
Mitchell v. Bass, 26 Tex. 372 ..... 14, 20, 58
Montague County v. Clay County Land and Cattle Co., 80 Tex. 392, 15 S. W. 902 38

Norcross v. Griffith, 65 Wis. 599, 27 N. W. 606, 56 Amer. Rep. 42 64

Olcott v. Bynum, 17 Wall. 44 ..... 11, 18, 71

Paine et al v. Consumers Forwarding & Storage Co. et al (6 C. C. A. Ohio), 71 Fed. 626, 58 A. L. R. 238 ..... 62, 70
Pecos & N. T. Ry. Co. et al v. Falls, 96 S. W. (2d) 430 62

Rand v. Cartwright, 82 Tex. 399, 18 S. W. 794 38
Reast v. Donald, 84 Tex. 648, 19 S. W. 795 ..... 14, 19, 56
Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080 ..... 14, 20, 62
Roxana Petroleum Corp. v. Corn (8 C. C. A. Kan.), 28 F. (2d) 168 61
Roxana Petroleum Corporation v. Sutter (8 C. C. A. Kan.), 28 F. (2d) 159 ..... 61, 62, 63, 64
Ruhlin v. New York Life Ins. Co., 304 U. S. 202 ..... 11, 71

Shell Pet. Co. v. Hollow (10 C. C. A. Kan.), 70 F. (2d) 811 61
Standefer v. Vaughan (Tex. Civ. App.), 219 S. W. 484 ..... 34, 35
Stanolind Oil & Gas Co. v. State, 129 Tex. 547, 101 S. W. 801 36
Swann v. Mills (Tex. Civ. App.), 219 S. W. 850 ..... 12, 13, 14, 18, 19, 46, 55

Temple v. Sanborn, 91 S. W. 1095 69

AUTHORITIES—Continued

Pages

Texas Bitulithic Co. v. Warwick (Tex. Com. App.), 293 S. W. 160 ..... 14, 20, 59, 67
Texas Pacific Ry. Co. v. Chandler, 20 S. W. (2d) 380 69

Van Camp v. Gulf Prod. Co., 122 Tex. 383, 61 S. W. (2d) 773 36
Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33 ..... 64, 65

Wegge v. Madler, 129 Wis. 412, 109 N. W. 223, 116 Amer. St. Rep. 953 64
Weiss v. Goodhue, 102 S. W. 793 (writ ref.) 62

TEXT BOOKS

6 A. L. R. 31, Ann. 2, Sec. Vg. 64
47 A. L. R., 1276, Sec. Vg. 64
9 C. J. 199, Sec. 89 64
9 C. J., Sec. 97, p. 203 62
9 C. J., Sec. 107, p. 205 62
11 C. J., "Boundaries," Sec. 35(4) 65
11 C. J. S. 581, Sec. 35A 64, 65
Devlin on Deeds, 2nd Ed., p. 312 62
17 L. Ed. 818, Ann. 64
4 R. C. L., Sec. 8, p. 79 62
7 Tex. Jur. 131, Sec. 11 64
7 Tex. Jur., Sec. 26, p. 59 38
7 Tex. Jur., Sec. 26, p. 149 38
7 Tex. Jur., Sec. 28, p. 152 ..... 13, 36
7 Tex. Jur., Sec. 47, p. 185 36
39 Tex. Jur., Sec. 6, p. 515 68
Thompson on Real Property, Sec. 3202, Note 60 64

STATUTES

Judicial Code, Sec. 240, as amended by the Act of February 13, 1925; 43 Stats. 938 (U. S. C. A. Title 28, Sec. 347 and Rule 38, par. 5) Subd. (b) 11

In The

Supreme Court of the United States

October Term, 1940

---

*No.*_____

CITIES SERVICE OIL COMPANY,
Petitioner

vs.

B. P. DUNLAP, ET AL,
Respondents

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

To the Honorable the Supreme Court of the United States:

Cities Service Oil Company, a Delaware corporation, respectfully presents this its petition for writ of certiorari to the Honorable Circuit Court of Appeals of the United States for the Fifth Circuit, and to such end respectfuly shows:

Opinions of This Court and Court Below

A prior petition for writ of certiorari having been granted No. 847 (307 U. S. 617), the court in an opinion by Mr. Justice McReynolds, No. 28 (308 U. S. 208), reversed the decision of the Circuit Court

(100 Fed. (2d) 294, rehearing 101 Fed. (2d) 314), and on remand the Circuit Court (R. 330-334, rehearing R. 361-362; 115 Fed. (2d) 720) adherred to its former judgment affirming the decree of the trial court.

Preliminary Statement

Prior decisions of the Honorable Supreme Court and Circuit Court of Appeals contain a summary of the matter involved. They show that petitioner's predecessor in interest, the owner of a producing oil and gas lease on a tract of approximately 68 acres, brought this equitable action in the United States District Court for the Eastern District of Texas against respondents to quiet its title and remove cloud from title to a strip of land 66 feet wide along the West side of its 68 acre tract, alleging that the strip was a part of its 68 acre lease (R. 20-28). Jurisdiction was based on diversity of citizenship, situs of the property and requisite amount. Respondents claiming the strip, filed answers and cross-action to quiet their title (R. 28-43). Petitioner was substituted for plaintiff (R. 50-52) and judgment rendered for respondents (R. 52-53). The trial court filed findings of fact and conclusions of law (R. 58-72), to which petitioner excepted (R. 73-81) and filed a request for additional conclusions (R. 81-91) and appealed (R. 299-328) in the name of Cities Service Oil Company under an amendment of its charter changing its name (R. 93).

After the cause was remanded by this Honorable Court the decree of the trial court was again affirmed

on December 2, 1940 (R. 330-334), and petitioner's motion for rehearing (R. 336-355) was overruled in a written opinion on January 4, 1941 (R. 361-362). Leave to file a second motion for rehearing (R. 364-382) was denied on January 30, 1941 (R. 388).

Summary and Statement of the Matter Involved

In 1854 Texas patented the Thomason Survey of 640 acres in the form of a square under field notes describing controlling objects on the ground at the four corners and giving measured distances for the four sides of 1760 yards (1900.8 vrs.) (R. 60 ¶ 2; 96). However, as disclosed by a remeasurement in 1934 (R. 95), the actual distances between the four objects were greater than given in the patent to the extent that the North line was 126 feet longer and the other lines were correspondingly excessive (R. 60 ¶ 2).

By mesne conveyances the East half of the survey vested in Louisa Rogers in 1882 (R. 60 ¶ 3) under a chain of conveyances giving the same distances as contained in the patent (R. 98-104). Under applicable Texas decisions she acquired title to 63 feet of the excess East and West along the North line of the East half of the survey because the call for the East half controlled the distance of 880 yards (950 vrs.) given in the instruments *(Ford v. McRae (Tex. Com. App.), 96 S. W. (2d) 80)* and the trial court so found and concluded (R. 60 ¶ 3; 67 ¶ 14).

In 1899 her four sons, having inherited the East half of the survey (R. 61 ¶ 4-5), partitioned it through deeds duly executed and recorded, by allot-

ting W. H. Rogers a tract of 75-4/5 acres in the Northeast corner; J. F. Rogers a tract of 68-1/5 acres in the Northwest corner, and the other two brothers jointly a tract of 176 acres in the South half (R. 105-109 ¶ 6). The aggregate distances given in the partition deeds were the same as contained in the patent and other instruments in their chain of title, but the adjoinders called for in the partition deeds included the entire East half in the division.(1)

The 66 foot strip involved in this controversy lies along the West side of the 68-1/5 acre tract allotted to J. F. Rogers, and petitioner contends same is a part thereof. J. F. Rogers' partition deed calls for three adjoinders, of which two are with the tract allotted to his brother, W. H. Rogers, and one is with the Wiley Davis tract located West of and conterminous with the West line of the East half of the survey. The North line of his tract begins at the Northwest corner of the W. H. Rogers tract No. 1 and runs West

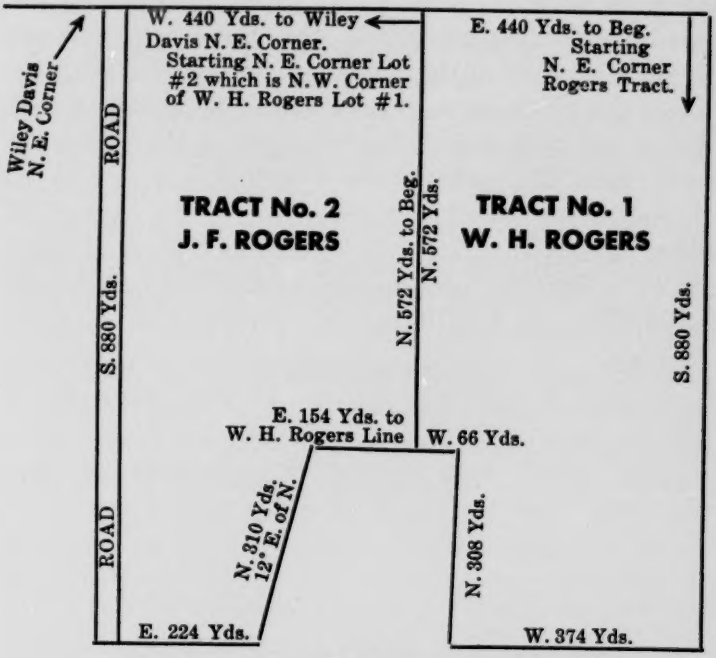
---

(1) In *Livingston Oil & Gas Co. v. Shasta Oil Co. (Tex. Civ. App.), 114 S. W. (2d) 378 (writ dismissed)*, the court, in holding the strip was a part of the land covered by the prior lease, said:

"Generally, it will not be presumed that a party granting land intends to retain a long narrow strip next to one of his lines; but if the courses and distances approximate closely to a line or corner of the tract owned by the grantor—especially if the description in the deed corresponds, exactly or substantially, with the description in the title papers under which the land is held—it will be presumed that the lines mentioned are intended to reach the corners and run with the lines of the tract, though the trees marked and described have disappeared before the making of the deed. Western Min. & Mfg. Co. v. Peytonna Cannel Coal Co., 8 W. Va. 406; cited with apparent approval in Shell Petroleum Corporation v. Landers, Tex. Civ. App. 107 S. W. (2d) 509, at page 512."

440 yards to "Wiley Davis Northeast corner," a definite, locative and controlling call for adjoinder. However, as disclosed by a remeasurement in 1934, the distance between these two corners is actually 462 yards or 66 feet more than 440 yards or the excess in the East half of the Thomason Survey (R. 63 ¶ 7). From the Davis corner the boundary then turns South 880 yards with no call for an object at the terminus; then East 224 yards; then North 310 yards at 12 degrees East (no objects called for at the termini of these lines); then East 154 yards to "W. H. Rogers line," a definite, locative and controlling call for an adjoinder, and then North 572 yards to place of beginning.

The following is a plat of the two tracts partitioned to W. H. and J. F. Rogers, showing the location of the strip.


W. 440 Yds. to Wiley Davis N. E. Corner. Starting N. E. Corner Lot #2 which is N.W. Corner of W. H. Rogers Lot #1.
E. 440 Yds. to Beg. Starting N. E. Corner Rogers Tract.
Wiley Davis N. E. Corner
ROAD
S. 880 Yds.
TRACT No. 2
J. F. ROGERS
N. 572 Yds. to Beg.
N. 572 Yds.
TRACT No. 1
W. H. ROGERS
S. 880 Yds.
E. 154 Yds. to W. H. Rogers Line
W. 66 Yds.
ROAD
N. 310 Yds. 12° E. of N.
N. 308 Yds.
E. 224 Yds.
W. 374 Yds.

As pointed out by this Honorable Court in its previous opinion, a measured distance of 440 yards along the North line of the 68-1/5 acre tract ends 66 feet East of the Davis corner and the discrepancy occasioned the controversy over the 66 foot strip lying between a South line from the Davis corner and a parallel one 66 feet to the East.

In 1930, J. F. Rogers' heirs executed an oil and gas lease duly recorded and filed, on the 68-1/5 acre

tract, incorporating the same description as contained in the partition deed, with the additional clause "it being the intention to include all land owned or claimed by lessors in said surveys" (R. 138-143; 66 ¶12). By assignment and succession petitioner became the owner of this lease under conveyances duly recorded (R. 66 ¶ 12).

After petitioner's lease had been recorded for about four years, respondent Dunlap, in 1934, obtained from the three brothers of J. F. Rogers and his heirs an oil and gas lease on the 66 foot strip above described (R. 246-253).

Claiming that the land described in the Dunlap lease of 1934 was within the boundaries of the earlier one of 1930, petitioner instituted this action to remove cloud. Dunlap and the Rogers, under a cross-bill, alleged that the call in the 1899 deed to J. F. Rogers "*for the Wiley Davis Northeast corner*" was inserted through inadvertence and mistake (R. 31 ¶ IV); that the corner was not fixed or located or susceptible of definite ascertainment in 1899; that the distance call of 440 yards controlled (R. 34 ¶ IX); **that the purpose of the parties was to establish the Western terminus of the North line 66 feet East of the Davis corner and leave a strip on the West in common ownership for use as a road** (R. 34-35 ¶ 10-11).

Respondents failed to prove that the Davis corner was not fixed on the ground or susceptible of ascertainment (R. 225-227) so the trial court found that the corner was 66 feet West of a measured distance of 440 yards (R. 63 ¶ VI; 67 ¶ 14; 58 ¶ 15; 66 ¶ 12).

In its first opinion the Circuit Court of Appeals in reforming the deed held that the scope of admissible evidence was enlarged by the pleaded issue that the call for the Wiley Davis corner got into the deed by mistake, and that parol and other extrinsic evidence of what was done and said was admissible and showed that the Northwest corner of the J. F. Rogers tract was purposely put about 66 feet East of the Davis corner so as to leave a strip undivided and under the control of the four Rogers heirs for the purpose of a road. It further held that parol evidence was admissible to prove that in 1899 a stake was driven in the ground by the surveyor 66 feet East of the Davis corner, although it was not mentioned in any deed in petitioner's chain of title; that equity would correct the mistake in calling for the Davis corner and in failing to call for the stake although petitioner claimed it was a bona fide purchaser for value without notice because there was no proof showing it was such a purchaser. On rehearing it held that while in Texas courts the rule is established that on an issue of bona fide purchaser for value without notice, the burden of proof is on the person attacking the legal title and asserting the equitable to prove notice, nevertheless the Texas rule being contrary to the Federal rule, would not be followed because the burden of proof is a matter of practice or procedure and not of substantive law.

This Honorable Court, in reversing and remanding the case, held that petitioner was entitled to the protection afforded a bona fide purchaser by the local Texas rule and in the absence of evidence showing it

was not a bona fide purchaser, its position was superior to a claimant asserting an equitable title.

Petitioner was not seeking to drill wells on the 66 foot strip which respondents pleaded was being used for a road nor was it in any manner disturbing the public in the use of the road. Respondents by having executed the oil and gas lease were attempting to use the strip for the purpose of drilling wells for oil.

On remand the Circuit Court held that the partition deed to J. F. Rogers was not ambiguous on its face, nor was it latently ambiguous although the given distance of 440 yards would not reach the Davis corner, because the rule was well established in Texas that a distance is generally overruled by a call for a fixed object, the law esteeming that a mistake in the measurement, or in recording it, is more likely than one about the fixed object. It held, however, that even though the deed could not be reformed against petitioner, a bona fide purchaser, nevertheless parol extrinsic evidence was admissible to prove the surveyor in 1899 set objects not called for in any deed in the chain of title at places not coincident with the called adjoinder (Davis corner), in establishing the allegations of respondents that the adjoinder call was mistakenly included in the partition deed. The court based its holding on the theory that by extending the North line of the 68-1/5 acre tract to the Davis corner the survey would not close because the distance of the South line would be short by 66 feet, thus creating a latent ambiguity. On rehearing its attention was directed to the fact that the survey would close by continuing the South line to the W. H. Rogers line,

an adjoinder called for in the partition deed to J. F. Rogers, but the court adherred to its previous opinion, holding on rehearing that the W. H. Rogers line was not a controlling adjoinder or monument because it was created in the partition and did not exist before. No authority was cited to support this holding and it is contrary to the rule of property announced by Texas courts.

Although the Honorable Circuit Court held that in light of the decision of this court the deeds could not be reformed, as it had first done, the very effect of its decision is a reformation in 1934 of the partition deed of 1899, after the rights of petitioner, a bona fide purchaser, had intervened, by rejecting and excluding the two controlling adjoinder calls, viz, the Wiley Davis Northeast corner and the W. H. Rogers line. The Circuit Court in its last two opinions, adherring to its prior affirmance of the decree of the trial court, has, in effect, failed to follow the opinion of this Honorable Court in the case at bar and the substantive law of Texas, as will be more fully shown hereinafter under "*Reasons Relied on for the Allowance of the Writ.*"

Statement of Grounds on Which Jurisdiction of the Supreme Court Is Invoked

The jurisdiction of this court is based upon *Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stats. 938; (U. S. C. A. Title 28, Sec. 347), and Rule 38 ¶ 5), Subd. (b)* of this Honorable Court, in that the Honorable Circuit Court of Appeals in construing the partition deed to J. F. Rogers, and in holding admissible parol extrinsic evidence to vary its terms, failed to follow the decisions of the Supreme Court of Texas, on matters of local substantive law, thereby rendering its opinion conflicting with and contrary to the applicable decisions of this court in the case at bar and in *Erie RR. Co. v. Tompkins, 304 U. S. 64; Ruhlin v. New York Life Ins. Co., 304 U. S. 202; Olcott v. Bynum, 17 Wall. 44; Massachusetts v. New York, 271 U. S. 65*, and *Hardin v. Jordan, 140 U. S. 371*, holding that the construction of deeds and presumption attended with their delivery are matters of local substantive law to be followed by United States Courts.

The Honorable Circuit Court failed to follow the local substantive law of Texas in the following particulars:

(a) In holding that even after the rights of petitioner, a bona fide purchaser, had intervened, the partition deed, although not patently ambiguous, would be construed so as to exclude the call for the Davis corner because of respondents' mistake in 1899, the Court failed to follow the applicable Texas cases of *Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69; Miller v.*

Southland Insurance Company (Tex. Civ. App.), 68 S. W. (2d) 558, and *Swann v. Mills (Tex. Civ. App.), 215 S. W. 850*, and other cases which hold that a bona fide purchaser acquires title to all land included between the adjoinders called for in his deed if there is nothing on the face of the conveyance to put him upon inquiry as to the claims of his predecessors in title arising out of their alleged mistake in calling for such adjoinders when they intended to stop at the distances given.

(b) In holding that, even though the partition deed was not ambiguous on its face, petitioner, a bona fide purchaser, did not acquire title to all the land between the adjoinders called for, the Court wholly disregarded the applicable Texas case of *Gulf Production Company, et al v. Baton (Tex. Civ. App.), 108 S. W. (2d) 960*, and other similar cases which hold that where a tract of land is partitioned among the joint owners, the presumption obtains in Texas that the whole of the land is partitioned unless some portion thereof is expressly excepted and such presumption becomes conclusive when the right of innocent purchasers have intervened. This presumption, if followed, would have precluded respondents from attacking petitioner's title because the adjoinder calls included the strip and nowhere was it expressly excepted from the partition deed.

(c) In holding that by extending the North line of the 68-1/5 acre tract to the Davis corner the survey would not close by 66 feet since the South line could not be continued to the W. H. Rogers line, an adjoinder called for, because such line had not existed

before, but originated in the partition and could not be considered a controlling monument, and in concluding that the call for the Davis corner was incorrect, the Court wholly disregarded the applicable Texas cases of *Brooks v. Slaughter (Tex. Civ. App.), 218 S. W. 632; Longoria v. Shaffer, 77 Tex. 547, 14 S. W. 160; Booker v. Hart, 77 Tex. 146, 12 S. W. 16; Bell v. Preston (Tex. Civ. App.), 47 S. W. 375,* and many other authorities cited in *7 Tex. Jur., Sec. 28, page 152, et seq.*, which hold that Texas follows the Pennsylvania rule that each and every corner created by and called for in partition deeds and each and every corner existing at the time of the partition and called for in the deeds, constitute one block or system of surveys and all tracts are to be located together as one block or one large tract in so far as they call for each other.

(d) In holding that a latent ambiguity existed, justifying a resort to parol extrinsic evidence to prove that the call for the Davis corner was mistakenly included in the partition, even as against a bona fide purchaser, the Court failed to follow the applicable Texas cases of *Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69; Miller v. Southland Insurance Company (Tex. Civ. App.), 68 S. W. (2d) 558,* and *Swann v. Mills (Tex. Civ. App.), 219 S. W. 850,* which hold that after the rights of a bona fide purchaser have intervened, parol evidence is not admissible to prove that an adjoinder was mistakenly called for and the predecessors in title intended for the distances and not the adjoinders to control the location of the boundaries.

(e) In holding that in locating boundaries, parol

evidence is admissible to show the locations of objects set by a surveyor although not called for in any instrument in the chain of title, and not coincident with the adjoinders called for, the Court wholly disregarded the applicable Texas cases of *Reast v. Donald, 84 Tex. 648, 19 S. W. 795*, and *Hays v. Clawson (Tex. Civ. App.), 286 S. W. 857 (writ dismissed)*, which hold that the locations of objects found on the ground but not called for in the field notes are inadmissible in fixing boundaries of a tract of land, particularly when such objects conflict with the field notes.

(f) In holding that there was a latent ambiguity in the partition deed because the distances given do not reach the adjoinders called for, the court failed to follow the applicable Texas case of *Swann v. Mills, 219 S. W. 850*, which holds that a deed is neither patently nor latently ambiguous because the distances given do not reach the adjoinders called for.

(g) In holding that the partition deed did not cover the 66 foot strip which respondents pleaded they were using for a road at the time of the partition, because it did not mention the road, and the wagon trail was only partly on the strip, but did not touch the land conveyed, the Court failed to follow the applicable Texas cases of *Mitchell v. Bass, 26 Tex. 372; Cantley v. Gulf Production Company, — Tex. —, 143 S. W. (2d) 912; Cox v. Campbell, — Tex. —, 143 S. W. (2d) 361; Texas Bitulithic Company v. Warwick (Tex. Com. App.), 293 S. W. 160; Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080; Amerman v. M. K. & T. Ry. Co., 182 S. W. 54*, and other cases which hold that where there is a convey-

ance of land adjacent to or adjoining a roadway, public or private, opened or closed, title to the road passes to the grantee by virtue of such conveyance unless there is in the conveyance language expressly rebutting such construction or specifically indicating a contrary intent, it being immaterial that the road was never opened, or was only used in part, or that it was abandoned.

Questions Presented

The questions presented in this petition for writ of certiorari were duly raised in the trial court by exception to the court's findings of fact, request for additional findings and in the briefs and motions for rehearing in the Circuit Court of Appeals.

The "*Statement of Grounds on Which Jurisdiction of the Supreme Court Is Invoked*" (ante-pp. 11-15) contains all the questions presented in this petition and to save prolixity reference thereto is here made.

Reasons Relied on for the Allowance of the Writ

Surveying is not an exact science but is dependent on the accuracy of man and delicate scientific instruments. It is a matter of common knowledge that in the early settlement of Texas the cost of surveying exceeded in many instances the value of the land. Experience taught the pioneers that it was less difficult and more economical to mark objects on the ground than to measure distances. As the State developed the inaccuracies of early surveys became apparent and with the discovery of oil in Texas land

that was worth scarcely a hundred dollars as early as 1900 became worth millions of dollars.

Texas courts were therefore confronted with much burdensome litigation involving the location of small strips and gores arising out of the fact that distances were not always accurate. Its courts announced the salutary rule that it would be presumed that a party granting land did not intend to retain long narrow strips next to his lines but that if the locations and distances approximated closely to a line or corner of the tract owned by the grantor,—especially if the description in the deed corresponded exactly or substantially with the title papers under which the land was held—it would be presumed that the lines mentioned were intended to reach the corners and run with the lines of the tract. *Livingston Oil and Gas Co. v. Shasta Oil Company (Tex. Civ. App.), 114 S. W. (2d) 378, writ dismissed,* correctly states the Texas rule.

It is therefore of great importance to the welfare and tranquility of the State that calls for adjoinders in many thousands of patents and deeds to land in Texas control courses and distances when the rights of bona fide purchasers have intervened and money has been expended on the reliance that the boundaries will be located according to the called adjoinders.

There should not be two rules of construction, one the Federal rule as announced by the Circuit Court that distances will control objects, even after the rights of bona fide purchasers have intervened, and the State rule that its citizens may buy, sell and lease real estate upon the assurances that calls for adjoinder will control the given distances.

In its first opinion the Circuit Court refused to follow the Texas rule on the presumption of innocence attended with the purchase of the legal title to land under deeds calling for adjoinders, but this Honorable Court, in reversing the case, held that the Texas rule was a valuable assurance in favor of the purchaser's title; so that thereafter the Circuit Court could not reform the partition deed of 1899, as it had done in the first instance by holding that parol evidence was admissible to show the call for the Davis corner was inserted in the deed through mistake, but in adherring to its affirmance of the decree, it held that, although there was neither indefiniteness nor contradiction on the face of the deed and no patent ambiguity, nevertheless there was a latent ambiguity because the distances would not reach the adjoinders. In determining what constituted controlling adjoinders it held without citing a single Texas case, that an adjoinder or line originating in a partition could not be considered a controlling monument since it had not existed before.

We therefore respectfully submit that the writ should be granted to correct the following errors of the Honorable Circuit Court:

(a) The Circuit Court failed to follow the decision of this Honorable Court in the case at bar in that it held that as against petitioner, a bona fide purchaser, the call for the Davis corner should be disregarded in favor of the distance of 440 yards. The result was a reformation of the instrument by striking the adjoinder call.

(b) It failed to follow the local law of Texas in construing

the deed and oil and gas lease, thereby rendering an opinion contrary to the decisions of this court holding that Federal Courts follow State Courts rules of evidence and construction of deeds in the trial of cases involving title to lands. Olcott v. Bynum, 17 Wall (84 U. S.) 44.

(c) The rule in Texas is that a bona fide purchaser acquires the legal title to all land included between adjoinders called for in his deed if there is nothing on the face of the conveyances to put him upon inquiry as to the claims of his predecessors in title arising out of their alleged mistake in calling for such adjoinders when they intended to stop at the distances given, and the Circuit Court of Appeals failed to follow such Texas rule by rejecting and disregarding the call for the Davis corner. Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69; Miller v. Southland Insurance Company (Tex. Civ. App.), 68 S. W. (2d) 558, and Swann v. Mills (Tex. Civ. App.), 219 S. W. 850.

(d) Texas courts follow the Pennsylvania rule that each and every corner created by and called for in partition deeds and each and every corner existing at the time of the partition and called for in the deeds, constitute one block or system of surveys and all tracts are to be located together as one block or one large tract in so far as they call for each other. Brooks v. Slaughter (Tex. Civ. App.), 218 S. W. 632; Longoria v. Shaffer, 77 Tex. 547, 14 S. W. 160; Booker v. Hart, 77 Tex. 146, 12 S. W. 16; Bell v. Preston (Tex. Civ. App.), 47 S. W. 375. The Circuit Court held that the call for the W. H. Rogers line could not be considered a controlling monument because it originated in the partition and did not exist before.

(e) Texas courts hold that where a tract of land is partitioned among the joint owners the presumption obtains that the whole of the land is partitioned unless some portion thereof is expressly excepted and the presumption becomes conclusive

when the rights of innocent purchasers are involved. Gulf Production Co. v. Baton, 108 S. W. (2d) 960. The 66 foot strip was not expressly excepted but was included by the call for the Davis corner. The Circuit Court of Appeals failed to follow the Texas rule of conclusive presumption attended with partitioning land after the rights of an innocent purchaser had arisen, by holding that the 66 foot strip was not included in the deed to J. F. Rogers in 1899.

(f) Texas courts do not admit the introduction of parol evidence to vary the terms of a deed to prove an adjoinder was called for through mistake after the rights of a bona fide purchaser have intervened. Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69; Miller v. Southland Insurance Company (Tex. Civ. App.), 68 S. W. (2d) 558, and Swann v. Mills (Tex. Civ. App.), 219 S. W. 850. The Circuit Court failed to follow the Texas rule but held that parol evidence was admissible to show the surveyor set objects not called for in the deed at places not coincident with the adjoinders, and to show that the parties intended to leave unpartitioned the 66 foot strip.

(g) Texas courts do not admit the introduction of parol evidence to show the location of objects not called for in a deed where such objects are at places different from the adjoinders called for. Reast v. Donald, 84 Tex. 648; 19 S. W. 795; and Hays v. Clawson (Tex. Civ. App.), 286 S. W. 857, writ dismissed. The Circuit Court of Appeals failed to follow the Texas rule by holding that parol evidence was admissible to show the surveyor in 1899 set stakes not called for in any deed in petitioner's chain of title at pl[illegible] not coincident with the adjoinders.

(h) Texas courts hold that a deed is not patently or latently ambiguous because the distances are insufficient to reach the adjoinders. Swann v. Mills, 219 S. W. 850. The Circuit Court of Appeals failed to follow the Texas rule in holding that the partition deed contained a latent ambiguity because the distances were insufficient to reach the adjoinders.

(i) Texas courts hold that where there is a conveyance of land adjacent to or adjoining a roadway, public or private, opened or closed, title to the road passes to the grantee, by virtue of such conveyance subject to the easement, unless there is in the conveyance language expressly rebutting such construction or specifically indicating a contrary intent. Mitchell v. Bass, 26 Tex. 372; Cantley v. Gulf Production Company, — Tex. —, 143 S. W. (2d) 912; Cox v. Campbell, — Tex. —, 143 S. W. (2d) 361; Texas Bitulithic Company v. Warwick (Tex. Com. App.), 293 S. W. 160; Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080; Amerman v. M. K. & T. Ry. Co., 182 S. W. 54. The Circuit Court of Appeals failed to follow the Texas rule by holding that title did not pass although respondents had pleaded they intended to use the strip for a road, since the deed did not mention the road and the travel was only on a part of the 66 foot strip and did not touch the land conveyed.

Conclusion

Counsel for respondents, except J. B. Parker and Curtis M. Willock, is Hon. Angus G. Wynne, who resides in Longview, Texas, and counsel for respondents, J. B. Parker and Curtis M. Willock, is Hon. Cecil N. Cook, who resides in Houston, Texas, all of whom have been duly served with copies of this petition and the record therein, as evidenced by their receipt and waiver of notice attached hereto.

WHEREFORE, for the reasons set forth herein, as well as in the supporting brief, hereto annexed, petitioner respectfully prays this Honorable Court to issue its writ of certiorari to the Honorable Circuit Court of Appeals for the Fifth Circuit, commanding

such Honorable Court to forthwith send up a full and complete transcript of the record; that all proceedings be certified to this Court, and that this cause be reviewed and the manifest errors of the Honorable Circuit Court of Appeals be revised and corrected, as provided by law; that upon hearing by this Honorable Court the judgment below be reversed, and petitioner's title to the land in controversy be quieted, the clouds cast upon its title by the claims of the respondents be removed, and that such further proceedings be held herein as may be provided by law and equity.

CLAYTON L. ORN,
Fort Worth, Texas,
DAVID B. TRAMMELL,
Fort Worth, Texas,
Attorneys for Petitioner.

A. M. EBRIGHT,
HAYES McCOY,
Bartlesville, Okla.,
H. J. PATTERSON, Austin, Texas,
PHILLIPS, TRAMMELL, ESTES,
EDWARDS & ORN, Fort Worth, Texas,
Of Counsel.

THE STATE OF TEXAS, }
COUNTY OF TARRANT. }

CLAYTON L. ORN, being duly sworn, says that he is of counsel for Cities Service Oil Company, a corporation, petitioner in the foregoing petition for certiorari; that he prepared the foregoing petition for writ of certiorari and that the allegations therein are true and that there is just cause for same as he verily believes.

.....
CLAYTON L. ORN

SUBSCRIBED AND SWORN TO before me this the 3rd day of March, A. D., 1941.

Ruby Hawkins,
Notary Public in and for
Tarrant County, Texas.

SEAL.

In The

Supreme Court of the United States

October Term, 1940

---

*No.*_____

CITIES SERVICE OIL COMPANY,
Petitioner

vs.

B. P. DUNLAP, ET AL,
Respondents

Brief in Support of Petition for Writ of Certiorari

May It Please the Court:

Petitioner presents this brief in support of its petition for writ of certiorari and to avoid prolixity, reference will be made to the petition wherever appropriate.

Opinions of This Court and Court Below

Same as ante, pp. 1-2.

Statement of Grounds on Which Jurisdiction Is Invoked

Same as ante, pp. 11-15.

Statement of the Case

Same as ante, pp. 2-10.

Specifications of the Assigned Errors Intended to Be Urged

1. The Honorable Circuit Court of Appeals failed to follow the decision of this Honorable Court in the case at bar in that it held that as against petitioner, a bona fide purchaser, the call for the Davis corner should be disregarded in favor of the distance of 440 yards, to the end that the partition deed was effectually reformed by striking the adjoinder call.

2. The Honorable Circuit Court of Appeals failed to follow the local law of Texas in construing the deed and oil and gas lease, thereby rendering an opinion contrary to the decisions of this court holding that Federal Courts follow State court rules of evidence and constructon of deeds in the trial of cases involving title to lands.

3. The Honorable Circuit Court of Appeals failed to follow the local law of Texas that a bona fide purchaser acquires the legal title to all land included between adjoinders called for in his deed if there is nothing on the face of the conveyance to put him on inquiry as to the claims of his predecessors in title arising out of their alleged mistake in calling for such adjoinders when they intended to stop at the distances given.

4. The Honorable Circuit Court of Appeals failed to follow the local law of Texas that each and every corner created by and called for in partition deeds and each and every corner existing at the time of the partition and called for in the deeds constitute one block or system of surveys and all tracts are to be lo-

cated together as one block or one large tract in so far as they call for each other.

5. The Honorable Circuit Court of Appeals failed to follow the local law of Texas that where a tract of land is partitioned among the joint owners, the presumption obtains that the whole of the land is partitioned unless some portion thereof is expressly excepted and the presumption becomes conclusive when the rights of innocent purchasers are involved.

6. The Honorable Circuit Court of Appeals failed to follow the local law of Texas which does not admit the introduction of parol evidence to vary the terms of a deed to prove that an adjoinder was called for through mistake, after the rights of a bona fide purchaser have intervened.

7. The Honorable Circuit Court of Appeals failed to follow the local law of Texas which does not admit the introduction of parol evidence to show the locations of objects not called for in a deed where such objects are at places different from the adjoinders.

8. The Honorable Circuit Court of Appeals failed to follow the local law of Texas in holding that the partition deed was latently ambiguous because the distances were insufficient to reach the adjoinders.

9. The Honorable Circuit Court of Appeals failed to follow the local law of Texas that where there is a conveyance of land adjacent to or adjoining a roadway, public or private, opened or closed, title to the road passes to the grantee by virtue of such conveyance, subject to the easement, unless there is in the

conveyance language expressly rebutting such construction or specifically indicating a contrary intent.

Argument

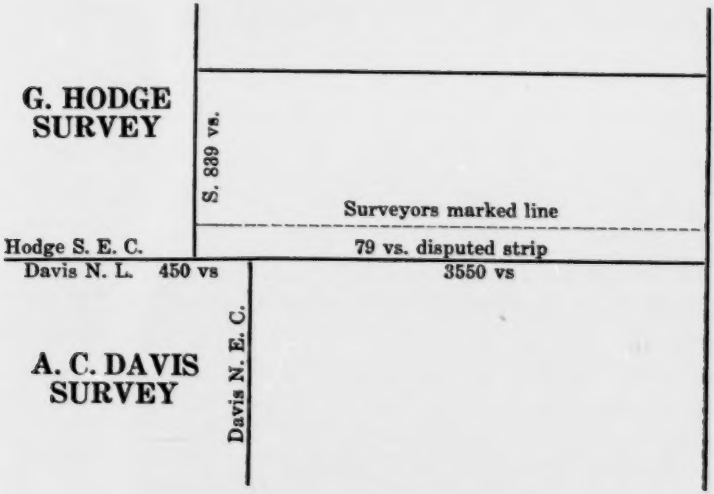
I.

In Texas calls for adjoinders override distances and after the rights of a bona fide purchaser have intervened a deed must be construed so as to vest such purchaser with title to all land situated between the adjoinders, even though they were mistakenly included in the deed.

In *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, a bona fide purchaser was permitted to recover the land adjacent to the adjoinder called for, even though in reaching such call a greater distance was required than that given in the deed, and even though the surveyor's footsteps showed he stopped at the distance given in the deed and marked the boundary line 75 varas away from the adjoinder called for, believing he was at the adjoinder.

The facts are very similar to those involved in the case at bar and were as follows: pursuant to a compromise agreement Garrison conveyed to Stephens a tract of land supposedly containing 640 acres. The deed called to begin at the Northwest corner of the tract conveyed and run "*South 839 varas to the Southeast corner of said Hodges survey, on the North*

boundary line of the A. C. Davis survey." This call located the West line of the tract conveyed. The deed called "*thence East at 450 varas, said Davis' Northeast corner, at 3550 varas, the East boundary line of said Frost survey.*" **This call located the South line of the tract conveyed. The distance called for in the West boundary line of 839 varas did not reach the Davis survey by some 79 varas but it reached the line actually run at the time the survey was made.** The strip lying between the line run by the surveyor and the North boundary line of the Davis tract constituted the area in dispute. We have sketched a plat illustrating the questions of boundary decided by Associate Justice Stayton:



Sometime after the conveyance Stephens, the grantee, moved his fence upon the most Southern line, being the true line of the Davis survey, and took actual

possession of the disputed line. Stephens subsequently sold the land to Crowell, who was the Appellee before the Supreme Court. Garrison sued Crowell for the 79 varas strip *upon the theory that the survey stopped at the called distance of 839 varas and a line was marked for the South line of the tract conveyed and such line did not coincide with the Davis line.* We therefore see that (a) an actual survey was made on the ground and the South boundary line as surveyed was distinctly marked on the ground 79 varas North of the Davis line called for; (b) the surveyor and parties had erroneously thought that the line they marked was the North line of the Davis survey and therefore they were mistaken as to the location of the adjoinders called for; (c) Stephens, the grantee, actually entered into possession of the 79 vara strip and built his fence along the true North line of the Davis survey; (d) Crowell purchased the tract from Stephens, his deed containing the same description as that from Garrison to Stephens; (e) *Crowell had no knowledge that the surveyor had stopped short of the adjoining calls a distance of 79 varas and hacked the South line 79 varas North of the adjoinder called for;* (f) *the hacked line and marked trees were not called for, the deeds calling only for adjoinder and course and distance.*

In holding that Garrison, the original grantor, could not prevail against Crowell the court said:

> **"If it be determined that Crowell is a bona fide purchaser, without notice, of the land in question the judgment must be affirmed without reference to any other question presented by this**

appeal, and we have no doubt that he must be so held. It does not appear that he knew that the distance of the west line called for in the deed would not reach the Hodges corner and the Davis line; therefore, there was nothing on the face of the conveyance to put him upon inquiry as to any claim on the part of appellant. He found Stephens in possession of the premises in controversy, holding under a duly recorded deed from appellant himself, which, according to well established rules of construction, embraced the land so possessed. He paid his money upon the faith of a conveyance which imputed an absolute title in his vendor, at least against appellant in this case, and we fail to see any reason why he should be excepted from the rule which protects the innocent purchaser for value against the claim of his adversary which was unknown to him at the time of his purchase. The case of Houston v. Sneed, 15 Texas 307, cited by appellant's counsel, does not sustain the proposition submitted by them upon this point. In that case Sneed was held not to be an innocent purchaser, because, at the time of his conveyance, Houston was in actual possession of the land up to the disputed line. This was considered as constructive notice to him of Houston's claim. But the court said: 'Had there been no settlement up to the agreed line, and no notice to him of it, he might have insisted upon the line originally established between Houston and McKinney called for by his deed.' It is evident that, in so far as the opinion bears upon this case, the authority is against appellant and not in his favor. The court below found against appellant upon the main proposition presented by his pleading; that is,

> **that the Hodges corner and Davis line were called for in the deed by mistake, and we are inclined to think that this finding is correct. But we need not consider that question. Appellee Crowell being a bona fide purchaser for value, appellant cannot recover."** (Pp. 628-629.)

The only difference in the facts in the case at bar and in the *Crowell* case are in favor of petitioner's contentions for the following reasons:

First: In the *Crowell* case, the surveyor, Garrison and Stephens were mistaken as to the location of the adjoinder. In our case Simmons and the four Rogers heirs knew the location of the Wiley Davis Northeast corner. The mistake in the deed from Garrison to Stephens was as to the actual location of the land described, while in the case at bar if there was any mistake it was not one as to the location of the Wiley Davis Northeast corner, but was in including more land than the heirs intended. We think in this respect our case is stronger than the *Crowell* case and for all the more reason the rights of an innocent purchaser should be protected. Respondents took the position that the surveyor did not know the location of the Wiley Davis corner and if such position was correctly taken, then the facts are identical with the *Crowell* case. The findings by the court are that the surveyor and the Rogers heirs knew the location of the Davis corner.

Second: In the *Crowell* case, Stephens, the original grantee from Garrison, took possession of the disputed strip and was in possession at the time he con-

veyed to Crowell. In the case at bar the disputed strip actually constituted a road and certainly respondents were not in possession of the road. The fact that Stephens was in possession of the disputed strip negatived the possession of Garrison and therefore there was nothing to charge Crowell with notice of Garrison's claim to the strip. The heirs of Louisa Rogers were not in possession of the road, and when Chandler and petitioner acquired the oil and gas lease there was no possession of respondents to charge petitioner with notice that respondents were claiming some interest in the road. On the other hand, petitioner was entitled to rely upon the presumption that the four heirs intended for the title to the road to pass to J. F. Rogers because they did not expressly reserve such title in the partition deed.

Third: In the *Crowell* case the trial court found that the call for adjoinder had not been inserted through mistake, although he found that the surveyor stopped short of the adjoinder 79 varas and marked the South line. The court in the case at bar found that the call for the Wiley Davis Northeast corner was inserted through mistake because he found that the surveyor stopped 66 feet short of the Wiley Davis Northeast corner and marked a line South. Certainly, if there was no mistake in the *Crowell* case, there was none in the case at bar because in following the footsteps of each surveyor the courts found that they stopped short of the adjoinder and marked a line. Justice Gaines brushed aside the finding of the trial court that the adjoinder was called for through mistake, saying:

"but we need not consider that question. Appellee Crowell being a bona fide purchaser for value, Appellant could not recover."

We therefore think that extrinsic evidence was inadmissible and could not form the basis for the decree entered in this case. The court should have concluded as a matter of law petitioner was an innocent purchaser and acquired title to the land adjacent to the Wiley Davis Northeast corner.

II.

In Texas calls for adjoinders created in a partition are as conclusive and controlling as are calls for adjoinders existing prior to the partition. In departing from this rule the Honorable Circuit Court attempted to make a distinction between the case at bar and Garrison v. Crowell, which does not in fact exist.

The bounds in the J. F. Rogers deed were fixed by three adjoinders, viz: the Northeast corner (place of beginning) was fixed at the W. H. Rogers Northwest corner, a corner that did not exist before the partition; the Northwest corner in the order of calls, was fixed at the Wiley Davis Northeast corner (the only corner called for that existed before the partition); and the balance of lines and corners were fixed by metes and bounds except the most southerly Northeast corner was fixed coincident with "W. H. Rogers

line" (a corner that did not exist before the partition). See plat, ante, p. 6.

In the opinion of December 2, 1940 (R. 330-334) the court held that there was neither indefiniteness nor contradiction on the face of the partition deed and no patent ambiguity. It stated that in an effort to trace the lines on the ground a discrepancy was found in that the distance from the beginning corner to the Davis corner was 66 feet more than 440 yards but that such discrepancy did not amount to an ambiguity because it was settled in Texas that distance is overruled by a call for a fixed object. It concluded, however, that an ambiguity existed because after leaving the Davis corner it developed that the beginning point was not reached by 66 feet since there were no other fixed objects mentioned in the deed. Based on this fact it held that the latent ambiguity required construction justifying a resort to extrinsic evidence to explain the true meaning. It wholly ignored the call for the W. H. Rogers line which would have likewise extended the South line East 66 feet and closed the survey. After disregarding the W. H. Rogers line the Honorable Circuit Court then stated that its opinion was not in conflict with *Garrison v. Crowell, 67 Texas 626, 4 S. W. 69*, because "In the description there involved, a measurement did, as here, fall short of the adjoinder's line as called for, but the next call was for another corner on this adjoinder's line, showing that the call for the line and not the measurement was correct. By allowing the calls for lines and corners to prevail over the measurements, the deed was consistent with itself; but confusion would have re-

sulted if the short measurement had been followed instead." The call for the Davis corner in the case at bar was as controlling and conclusive as was the call for an adjoinder in the Crowell case, and in law it matters not that in the Crowell case, another adjoinder was called for along the line.

In the motion for rehearing (R. 336-337) petitioner called the court's attention to the fact that there was a call for another adjoinder after leaving the Wiley Davis Northeast corner, being the W. H. Rogers line which would have extended the South line of the Survey 66 feet and resulted in reaching the point of beginning, but the court, in a written opinion, overruled the motion, stating that it did not regard the W. H. Rogers' line as another fixed object because the line originated in and was a part of the partition survey and therefore, not having existed before, could not be considered a controlling monument.

In an effort to distinguish the case at bar from the *Crowell* case, the court violated the most fundamental rule of law in Texas that all corners created by a partition belong to each tract, and each corner so created and called for must be accepted as controlling in locating the various tracts. Lots constituting a block must not be treated as separate and individual ones, nor can each lot be located independently of the rest by its own individual lines or calls for courses and distances, but all lots are to be located together as one block or one large tract in so far as they call for each other.

In *Standefer v. Vaughan (Tex. Civ. App.), 219 S. W. 484,* the Texas rule that lines and corners in a

block or system of surveys belong as much to one block or section as another therein, is clearly stated as follows:

> **"In arriving at the true location of block 1, G. C. & S. F., we think the conditions and circumstances surrounding its location, as well as the lines actually run by the surveyor, and the corners fixed upon the ground, should be taken in consideration to ascertain, if possible, his intent in placing block 1. We believe it is an established and recognized rule of our courts that marked lines and corners in a block or system of surveys belong as much to one block or section as to another therein. The Supreme Court of the United States, through Justice Lamar, in speaking of the rule that prevails in Pennsylvania, in the case of Clement v. Packer, 125 U. S. 327, 8 Sup. Ct. 915, 31 L. ed. 728, said:**
>
> **" 'By the settled laws of Pennsylvania applicable to the location of surveys, original marks and living monuments on the ground constitute the survey, and they are the highest proof of its true location. The next most important evidence of location is the calls for adjoining surveys; and in the absence of both of them, and then only, the lines according to courses and distances returned by the surveyor into the land office determine the location. But it is equally well settled by an unbroken current of decisions in that state that the surveys constituting a block are not to be treated as separate and individual surveys; nor can each tract be located independently of the rest, by its own individual lines or calls or courses and distances, but such surveys are to be located together as one block or one large tract. If lines and corners made for such blocks of surveys can**

be found upon the ground, this fixes the location of the block, even to the disregard of the call for adjoinders. The lines and corners found upon any part of the block of surveys belong to each and every tract of the block, as much as though they do to the particular tract which they adjoin'." (219 S. W. at page 489.)

The same rule is announced and followed in *Brooks v. Slaughter (Tex. Civ. App.), 218 S. W. 632; Longoria v. Shaffer, 77 Tex. 547; 14 S. W. 160; Booker v. Hart, 77 Tex. 146; 12 S. W. 16; Bell v. Preston (Tex. Civ. App.), 47 S. W. 375,* and many other authorities cited in *7 Tex. Jur., Sec. 28, page 152 et seq.*

While it is true that the W. H. Rogers deed did not call for an object on the ground at the point where the J. F. Rogers deed called for the W. H. Rogers line, it is also true that the W. H. Rogers deed did not call for an object on the ground at its Northwest corner where the J. F. Rogers deed called for the beginning point. However, the rule in Texas is that a call for an unmarked line will control course and distance if its location can be determined accurately from identifying corners of adjoining surveys, the line in such case possessing the dignity of an artificial object. *7 Tex. Jur., Sec. 47, p. 185; Maddox v. Turner, 79 Tex. 279, 15 S. W. 237; Stanolind Oil & Gas Co. v. State, 129 Tex. 547, 101 S. W. 801,* and *Van Camp v. Gulf Production Co., 122 Tex. 383; 61 S. W. (2d) 773.*

If the Circuit Court of Appeals subsequently follows its opinion the result will be a breaking loose of

all adjoinder ties in partition deeds where such adjoinders have been created by the partition and have not existed before.

It cannot reasonably be said that W. H. Rogers' corner must be accepted as a beginning point, and then the W. H. Rogers' line disregarded when called for thereafter, for the reason that the two calls for adjoinder with the W. H. Rogers tract are of equal dignity, created at the same time, by the same surveyor, the same parties, and in the same instrument. If the Honorable Circuit Court correctly held that should the call for the Wiley Davis Northeast corner be accepted the survey would not close because the call for the W. H. Rogers line would not control since it had not existed before the partition but was created in it, then it necessarily follows axiomatically that W. H. Rogers' Northwest corner would not control as the beginning point, for it likewise was created in the partition and had not existed before. If neither of the W. H. Rogers corners fixed in the partition deed could be considered controlling monuments because they had not existed before, there would be only one way to locate the J. F. Rogers tract from the field notes contained in his deed and petitioner's lease and that would be by accepting as controlling the call for the Wiley Davis Northeast corner, the only adjoinder existing before the partition and from such corner constructing the balance of the survey by courses and distances, disregarding the two W. H. Rogers corners. Under such construction, title to the 66 foot strip vested in J. F. Rogers and petitioner, subject to the easement for road purposes. A survey may be con-

structed from any well established point or corner found on the ground, and hence a beginning corner is of no greater weight or importance than any other point or corner which is as well established and identified. All corners found are of equal importance. *7 Tex. Jur., Sec. 26, page 149; Rand v. Cartwright, 82 Tex. 399, 18 S. W. 794; Montague County v. Clay County Land and Cattle Company, 80 Tex. 392, 15 S. W. 902.*

III.

There is a conclusive presumption in Texas after the rights of a bona fide purchaser have intervened, that the whole of a tract of land is partitioned unless some portion thereof is expressly excepted.

The 66 foot strip was not expressly excepted from the partition but it was included by the call for the Wiley Davis Northeast corner. Petitioner was a bona fide purchaser and had the Federal Court followed the presumptions attended with the purchase of land in Texas it would have held petitioner acquired title to the 66 foot strip. In *Gulf Production Company, et al v. Baton (Tex. Civ. App.), 108 S. W. (2d) 960,* the court said:

> *"This is not alone true by virtue of the existence of the agreed boundary line, but because the presumption obtains in this state that, where a tract of land is partitioned among the joint own-*

ers, the whole of said land is partitioned unless some portion thereof is expressly excepted, and especially does this presumption obtain in cases similar to the case at bar. And this presumption becomes conclusive when the rights of innocent purchasers are involved. Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391." (108 S. W. (2d) at pages 965-966.)

IV.

There was no latent ambiguity in the partition deed.

After the Honorable Circuit Court had disregarded the call for the W. H. Rogers line it held there was a latent ambiguity in the partition deed requiring construction and it concluded that without parol evidence it appeared that the call for 440 yards was correct and the Davis corner in error. There is no latent ambiguity in the deed when the call for the W. H. Rogers line is accepted, even though the distance of the South line will be 66 feet greater than given in the partition deed. The Circuit Court held that a latent ambiguity did not exist because the Davis corner was 66 feet further than 440 yards and for the same reason it should have concluded there was no ambiguity in the South line because the distance to the W. H. Rogers line was 66 feet greater than given in the partition deed. Excess of distances in the *Crowell* case did not create an ambiguity justifying the court in stopping the boundaries at the distances

given, although the surveyor, by a mistaken belief as to the location of the adjoinder, marked his line at the distances given. The deeds called for the adjoinder and not the objects set by the surveyor, and the court held a bona fide purchaser acquired the title to the adjoinder.

The rule in Texas is that if an instrument is so worded that it can be given a definite legal meaning or interpretation, it is not ambiguous and parol evidence is not admissible to render the instrument ambiguous. The rule obtains, even to the extent of prohibiting proof of circumstances surrounding the transaction when the instrument involved, by its terms, discloses the intention of the parties. *Lewis v. E. Texas Finance Co. — Tex. —; 146 S. W. (2d) 977.* In that case the instrument omitted one call and it contained the clause "not including the road" but the court held the description was unambiguous and parol testimony was not admissible to show that the parties intended to retain a long, narrow strip next to the tract conveyed.

A latent ambiguity was held not to exist in *Miller v. Southland Insurance Company (Tex. Civ. App.), 68 S. W. (2d) 558*, in which the facts show that P. E. Miller conveyed to Athens Pottery Company, a joint stock association, the following described tract of land:

> "Beginning at the Southwest corner of said Large Lot No. 4;
>
> "Thence North 228 feet a stake for corner;
>
> "Thence in an Easterly direction with the

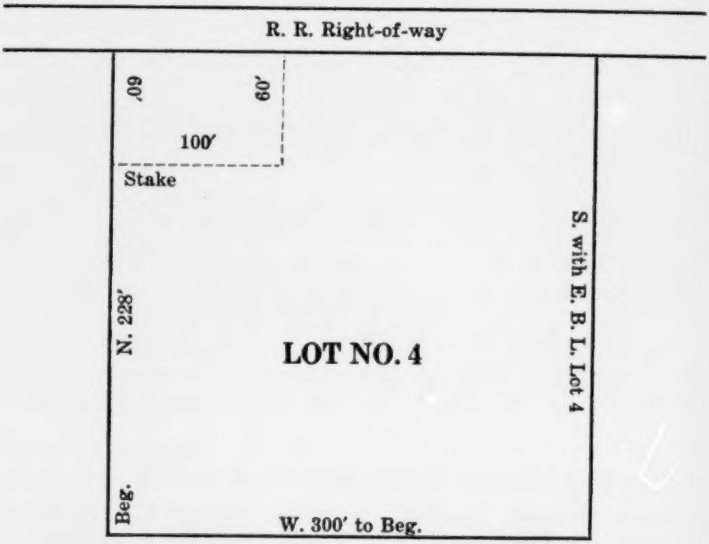
South boundary line of the right of way of the T. & N. O. RR. Co. to a point where said right of way intersects the East boundary line of said Large Lot No. 4, a stake for corner;

"Thence South with the East Boundary line of said Large Lot No. 4, to the Southeast corner of same;

"Thence West 300 feet to place of beginning." (P. 559.)

Later, the Athens Pottery Company, a joint stock association, conveyed by the same description to the Athens Pottery Company, a corporation. The Athens Pottery Company, a corporation, then conveyed to M. K. Miller the land by the same description as in the foregoing deeds. M. K. Miller then conveyed the land by the same description to H. B. Seay in trust to secure payment of certain notes in favor of Southland Life Insurance Company. P. E. Miller, the original grantor, sued the Southland Life Insurance Company to recover a tract 60 feet x 100 feet out of the Northeast corner of the tract conveyed, contending that the field note description did not cover said tract. On the trial of the case Miller testified that he and his surveyor laid out the tract at the time of the conveyance to the Athens Pottery Company and they had begun at the Southwest corner and measured North 228 feet to a point 60 feet South of the right of way and set a stake and then they had run Easterly paralleling the right of way 100 feet and then North 60 feet to the right of way, leaving a lot 60 x 100 feet in the corner for his home. He testified that he had no intention to include the lot in the conveyance to the Athens Pot-

tery Company. The plat below illustrates the location of the tract 60 x 100 feet with reference to the larger tract.



Miller sued to reform the deed to the Athens Pottery Company and the deed of trust by excluding the tract 60 x 100 feet. *The evidence showed that the call "thence North 228 feet a stake for corner" did not reach the railroad right of way.* This call did not call for the railroad right of way but actually called for a stake. The next call was "*then in an Easterly direction with the South boundary line of the right of way of the T. & N. O. R. R. Co. to a point where said right of way intersects the East boundary line of said large lot No. 4, a stake for corner.*" It was Miller's contention that since the called distance of 228 feet did not

reach the right of way by 60 feet the deed was ambiguous and parol testimony was admissible to show that the surveyor stopped at 228 feet and then went East and North, cutting out the lot 60 x 100 feet. It is to be noted that the deed actually called for a stake at 228 feet. The trial court instructed a verdict against Miller and the Court of Civil Appeals on an original hearing reversed and remanded the case but on rehearing affirmed the case after its attention had been called to the *Crowell* case.

In its original opinion the Court of Civil Appeals held that extrinsic evidence was admissible to show the footsteps of the surveyor and to determine which of the conflicting calls controlling effect should be given. In other words, it followed the same rule concerning construction of deeds that the Circuit Court announced in the case at bar, using this language:

> "The question which first arises in this case is one of boundary. It arises out of the fact that the west line of the land in controversy measured from the southwest corner of lot 4 north to the Texas & New Orleans right of way is 288 feet in length, whereas the distance call of the west line of the tract conveyed by P. E. Miller by deed dated June 13, 1920, is 228 feet.
>
> "In this connection appellees invoke the rule often applied that a call for the line of an adjoining survey will prevail over a distance call. They invoke this rule as applicable in view of the call in their field notes for the south boundary line of the right of way of the Texas & New Orleans Railroad Company.
>
> "Rules for ascertaining boundaries are for the

purpose of carrying out the intention of the parties, which intention is to be ascertained upon the face of the grant, read in the light of the surrounding facts and circumstances. It frequently happens that the description of land contained in a deed is consistent upon its face, but when it is attempted to be applied upon the ground inconsistencies in the calls develop. In such cases controlling effect is always given to the call which will give effect to and carry out the intention of the parties and the call inconsistent with and which will defeat that intention is rejected as false regardless of the comparative dignity of the conflicting calls. The rules of comparative dignity of calls are merely helpful in determining to which of the conflicting calls controlling effect shall be given. 7 Tex. Jur. Title Boundaries, secs. 5, 33, 34." (Id. p. 561.)

"It seems that the only lines actually run are those referred to by Miller and Hable. According to Miller's testimony, corroborated by Hable, the stake called for at a distance of 228 feet north of the southwest corner of lot 4 was established as a corner of the land to be conveyed and marked by an iron stake. The distance called for —228 feet—was the correct distance. It was not a mistaken call and to arbitrarily extend the west line to the right of way line by virtue of the second call in the field notes is not permissible. To do so would be to disregard the distance call of a line actually surveyed and a corner established by an artificial monument, the location of which can be definitely determined.

"The north corner of the west line as established upon the ground and marked by a stake

at a distance of 228 feet north of the southwest corner of lot 4, and 60 feet south of the Texas & New Orleans right of way, controls." (Id. p. 561.)

"The trial court evidently assumed that as a matter of law the call for the Texas & New Orleans right of way controlled the distance call of the west line, but upon the facts shown 'the question was not purely one of law, to be decided according to the precedence to be given to the different calls, but was a mixed question of law and fact, in determining which, both the rules of law and the evidence as to the foot steps of the surveyor were to be considered.' Castleman v. Pouton, 51 Tex. 84.

"Upon no other theory can the peremptory charge in favor of the insurance company be sustained." (Id. p. 562.)

On rehearing attention was called to *Garrison v. Crowell*, and after a study of the case, the motion was sustained and the case affirmed. The court quoted at length from this leading authority and said:

"In the present case the residence in the northwest corner of the tract burned some time before the insurance company acquired its lien. M. K. Miller, the borrower, was in possession of the entire lot from the railway south to the south boundary line. Miller had constructed buildings along the whole of the west line of the property. Appellants' representative inspected the property and there was nothing in its physical aspect or in its occupancy which could have put the insurance company upon notice of any claim adverse to M. K. Miller. Under these circumstances and

> **the authority of the case cited, we hold the insurance company, as a bona fide lienholder without notice, is protected against the adverse claim of title of appellants arising out of the boundary dispute; and, since the jury found the property had been abandoned as a homestead at the time it was conveyed to M. K. Miller, the judgment in favor of the insurance company should be affirmed."** (Id. p. 563.)

Another case holding that a purchaser of a tract of land with boundaries fixed in a deed by calls for adjoinders, takes a legal title that cannot be defeated by an equitable title based on an alleged mistake in calling for adjoinders, is *Swann v. Mills (Tex. Civ. App.), 219 S. W. 850 (writ dismissed).* In that case the Neil Survey's West line and the Duncan Survey's East line were conterminous. Mills owning a tract in the Neil, sued Swann owning a tract in the Duncan, in trespass to try title, and the case involved the boundaries between the Mills and Swann tracts. Mills acquired title to his 153 acre tract in the Neil Survey in 1913 from Bellamy, under a deed that called for his West line to be the West line of the Neil Survey, and called for other objects, natural and artificial, and courses and distances. Bellamy had acquired title to the tract so conveyed to Mills, by a deed from Ingraham in 1910, which likewise called for his West line to be the West line of the Neil Survey. Swann, who was the defendant below, owned a tract in the Duncan Survey which was West of and adjoining the Neil Survey, and his East line was the East line of the Duncan Survey, which was also the West line of the Neil Survey and Mills tract. The evidence showed

that before Ingraham conveyed the tract out of the Neil Survey to Bellamy, a surveyor went on the ground and ran out the lines, taking the West line he ran as the West line of the Neil Survey, and the East line of the Duncan Survey. Bellamy was shown the line run and marked by surveyor Pogue. The line the surveyor ran was not the true West line of the Neil Survey, the East line of the Duncan Survey, the East line of the Swann tract, but was some distance East of the true line. The surveyor's field notes were embodied in the deeds from Ingraham to Bellamy and Bellamy to Mills. Swann sought to confine Mills, the plaintiff, to the line surveyed and marked by the surveyor, while Mills claimed title to the true West line of the Neil Survey, the East line of the Duncan Survey, in accordance with the call for such adjoinder in his deed. It necessarily followed that if the surveyor was mistaken in the true location of the West line of the Neil Survey, running his surveyed line to the East thereof, the field notes in the deeds incorporating his survey were out of balance for the distances given would not be sufficient to reach the West line of the Neil Survey in its correct position. The court held that in locating Mills' tract he was not confined to the line run by the surveyor, or to the distances given, but acquired the legal title to the adjoinder called for (Neil Survey's West line) wherever it was located, and he was not charged with notice of any equitable claim of Bellamy to a strip between the line run by the surveyor and the Neil Survey's true West line.

The court said that both deeds called for the Neil West line, and neither called for objects, natural or

artificial, which conflicted with the true Neil line as originally established, and concluded: **"We then have field notes in which there is neither a patent or a latent ambiguity as to that boundary."** Under this authority, incorrect distances do not create a latent or patent ambiguity, for certainly the distances given in the field notes between the Neil West line and the creek and other objects called for in the deed were incorrect, when the Neil West line was properly located in the Western position, because the distances were based on an incorrect location of the Neil West line. The Court said:

> "The proposition relied on by the appellants is that, where a tract of land is sold with reference to a survey made at the time, the footsteps of the surveyor determine the true boundaries and mark the limits of the land intended to be conveyed. The correctness of that statement as the general rule in the location of boundaries need not be disputed. But its application to particular cases must be controlled and modified by other rules equally as well established. Assuming, as the charge requested does, that the evidence was sufficient to justify a finding that, when Bellamy purchased from Ingraham, Pogue surveyed and established as the west boundary a line east of the true west boundary line of the Neil survey, and that Bellamy understood and accepted that as his line, there are other facts in this case to be considered which make improper the rendition of a judgment in favor of the appellants based upon such finding; it will be observed that in both deeds—that from Ingraham to Bellamy and from Bellamy to Mills—the west boundary line

of the Neil survey is called for, and is the first call mentioned, as the west boundary line of the land conveyed. Neither of those deeds calls for any objects, natural or artificial, which conflict with the true Neil line as originally established. We then have field notes in which there is neither a patent or a latent ambiguity as to that boundary. If we rely upon the language which the parties incorporated in the written conveyances introduced in evidence, and which are not attacked as incorrect, Bellamy and Mills both purchased to the true Neil west boundary line. The rule is well settled that in such cases the written description controls." (P. 852.)

"It may be that in a contest between Ingraham and Bellamy, or one claiming under Bellamy with notice, Ingraham would, upon a proper showing, have a right to restrict the purchaser to the line surveyed by Pogue. But in order to do so he would be required to allege and prove a mistake in the field notes of his deed. Whether Ingraham intended to do so or not, he executed a deed which conveyed to the true west boundary line of the Neil survey, and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed." (p. 852.)

V.

Johnson v. Archibald, 78 Tex. 96, 14 S. W. 266; Booth v. Upshur, 26 Tex. 64; State v. Sullivan, 92 S. W. (2d) 228, and Blake v. Pure Oil Company, 100 S. W. (2d) 1009, cited by the Circuit Court of Appeals, are not applicable because they do not involve the construction of deeds after the rights of bona fide purchasers have intervened.

Several Texas cases hold that as between the original parties or between parties with notice, parol evidence is admissible to show that a call for an adjoinder or an object on the ground was made by the surveyor's mistake as to its location, but such rule is inapplicable when the rights of a bona fide purchaser have intervened. In *Garrison v. Crowell, supra*, the court stated it was immaterial that the adjoinder was called for by mistake and the survey stopped at the distance given in the deed because the rights of a bona fide purchaser had intervened and he was entitled to all land between the adjoinders.

Miller v. Lemm, 276 S. W. 211, cited by the court as supporting its holding that in case of an ambiguity parol evidence was admissible to aid in the construction of the deed, involved a patent ambiguity.

We respectfully submit that the Honorable Circuit Court, in applying the rule that "the footsteps of the surveyor must be followed to carry out the intention

of the parties," has fallen into the same error that the Texas Court of Civil Appeals did in the original opinion in *Miller v. Southland Life Insurance Company*, supra, in which case, after the court's attention had been called to the fact that the rules announced in the original opinion did not apply after the rights of a bona fide purchaser had intervened, it granted the motion for rehearing, reversed its previous decisions and followed the calls for adjoinders. In its original opinion the Texas Court of Civil Appeals said:

> **"It frequently happens that the description of land contained in a deed is consistent upon its face, but when it is attempted to be applied upon the ground inconsistencies in the calls develop. In such cases controlling effect is always given to the call which will give effect to and carry out the intention of the parties and the call inconsistent with and which will defeat that intention is rejected as false regardless of the comparative dignity of the conflicting calls. The rules of comparative dignity of calls are merely helpful in determining to which of the conflicting calls controlling effect shall be given. 7 Tex. Jur., title Boundaries, secs. 5, 33, 34."** (68 S. W. (2d) at page 560.)

The similarity of the opinion in the case at bar to that of *Miller v. Southland Life Insurance Company*, as above set forth, is so evident that we repeat the quotation from *Johnson v. Archibald*, used by the Honorable Circuit Court in its original opinion as an authority:

> "Certain calls, such as for natural objects,

> marked lines and corners, being less likely the result of mistake, in the absence of other evidence prevail over calls for course and distance; but the survey actually made is in legal contemplation the true survey, and it is always competent to show by any legal evidence where the lines were in fact run on the ground. It follows therefore that whenever the evidence is sufficient to induce the belief that the mistake is in the call for natural or artificial objects and not in the call for course and distance, the latter will prevail and the former will be disregarded."

However, in *Miller v. Southland Life Insurance Company*, when the court's attention was called to the holding in *Garrison v. Crowell* that after the rights of a bona fide purchaser had intervened the footsteps of the surveyor would not be followed if they were not to or along the adjoinder called for, the court granted a rehearing and reversed its previous opinion, quoting at length from *Garrison v. Crowell* and concluding:

> **"Under these circumstances and the authority of the case cited, we hold the insurance company, as a bona fide lienholder without notice, is protected against the adverse claim of title of appellants arising out of the boundary dispute; and, since the jury found the property had been abandoned as a homestead at the time it was conveyed to M. K. Miller, the judgment in favor of the insurance company should be affirmed."** (68 S. W. (2d) at page 563.)

VI.

It will not be presumed that a party granting land intends to retain a long, narrow strip next to one of his lines if the courses and distances approximate closely to the line of the tract owned by the grantor.

The distances of the lines in the patent were given as 1760 yards (1900.8 vrs.) and each subsequent instrument in the chain of title to the East half of the survey gave distances of 880 yards. The East half carried an excess East and West of approximately 22 yards. When the partition deed was prepared in 1899 the distance given between the Northeast and Northwest corner of the East half was 880 yards, exactly as such distance had been given in each previous instrument.

In *Livingston Oil & Gas Co. v. Shasta Oil Co. (Tex. Civ. App.) 114 S. W. (2d) 378 (writ dismissed)*, the court, in holding the strip was a part of the land covered by the prior lease, said:

> *"Generally, it will not be presumed that a party granting land intends to retain a long narrow strip next to one of his lines; but if the courses and distances approximate closely to a line or corner of the tract owned by the grantor —especially if the description in the deed corresponds, exactly or substantially, with the description in the title papers under which the land is held—it will be presumed that the lines men-*

tioned are intended to reach the corners and run with the lines of the tract, though the trees marked and described have disappeared before the making of the deed. Western Min. & Mfg. Co. v. Peytona Cannel Coal Co., 8 W. Va. 406; cited with apparent approval in the Shell Petroleum Corporation v. Landers, Tex. Civ. App., 107 S. W. (2d) 509, at page 512."

Because of this fact petitioner should have been protected in the calls for adjoinders and the distances should have been disregarded.

VII.

Course controls distance and even if the call for the W. H. Rogers line be disregarded, no latent ambiguity exists because the survey will close.

In *Livingston Oil & Gas Company v. Shasta Oil Co. (Texas Civil Appeals), 114 S. W. (2d) 378 (writ dismissed)*, the court held that the course of one line will control the distance of another. Even though the call for the W. H. Rogers line is disregarded and the call for the Davis corner is accepted, nevertheless the survey will close because the most Northerly South line must be extended to a point South of the Northeast corner of the J. F. Rogers tract, the place of beginning, thereby letting the course of the East line of the tract control the distance of the most Northerly South line. This point was definitely decided in *Liv-*

ingston Oil & Gas Co. v. Shasta Oil Co., supra, and the deed in that case was held unambiguous.

VIII.

After the intervention of the rights of a bona fide purchaser, parol evidence is not admissible to prove that a surveyor set objects not called for in the deed, when the location of such objects conflict with the adjoinders called for; nor is parol evidence admissible to prove that adjoinders were included in the deed by mistake.

The Honorable Circuit Court held that since there was a latent ambiguity, parol evidence was admissible to show that the Rogers heirs did not intend to include the strip in the partition and erroneously called for the Wiley Davis Northeast corner. The trial court held that parol evidence was admissible to prove the surveyor in 1899 set stakes, although not called for in the deeds, at places different from the adjoinders called for in such deeds. (R. 68 ¶ 16.)

We respectfully submit that under *Garrison v. Crowell, Miller v. Southland Life Insurance Company* and *Swann v. Mills, supra,* this testimony was inadmissible as against petitioner, a bona fide purchaser.

The locations of objects found on the ground, but not called for in field notes, are inadmissible in fixing boundaries of a tract of land, particularly when such

objects conflict with field notes. *Reast v. Donald, 84 Tex. 648, 19 S. W. 794; Hays v. Clawson (Tex. Civ. App.), 286 S. W. 857 (writ dismissed).*

IX.

Disregarding for the moment the call for the Wiley Davis Northeast corner, and construing the deed according to Texas decisions, title to the road passed to J. F. Rogers and petitioner subject to the easement, because the land described went to and was bounded by the road, and the deed and lease did not expressly reserve title in grantors and lessors. Parol evidence was not admissible to show the grantors intended to reserve title to the road, or set stakes not called for in their deeds. The Texas decisions create rules of property to be followed by Federal Courts.

The Honorable Circuit Court in its opinion stated:

> "The court properly heard the testimony of persons who were present at the survey, and it clearly showed that the northwest corner of Lot No. 2 was deliberately and purposely put about a chain's length east of the Wiley Davis corner so as to leave a strip undivided and under the control of all four tenants in common for the purpose of a road."

This being true, the called distance of 440 yards ex-

tended to the edge of the strip of land the heirs set aside for a road, and title to the road passed to J. F. Rogers because the partition deed contained no express reservation of the road in grantors. **An unexpressed intention to reserve title is not sufficient; the reservation must be in the deed.** The Circuit Court, after holding that under settled rules of law a conveyance of land adjoining a road will carry the grantor's title to the servient fee of the road because of the presumption based on public policy that parties would not reserve a long narrow strip for which they had no use, then erred in holding that "if the intention to do so is clear (meaning reserve title to the road) the contrary presumption must yield," for the court failed to limit the exception to the rule to **"an intention expressed in the instrument."**

The court likewise erred in holding "There is a plainly **expressed** intention not to add the strip to Lot No. 2 but to retain joint control and ownership. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a **reservation** of the land * * *." If there was no occasion to make a reservation of the land in the deed to J. F. Rogers (and none was made), see deed (R. 105), then there was no "expressed intention" in the deed not to add the strip to Lot No. 2.

A purchaser from the heirs of J. F. Rogers and their lessees, such as was petitioner, could not glean from the partition deed and the oil and gas lease subsequently acquired by petitioner, that the four Rogers heirs intended to reserve title to the road, particularly in light of the fact that each of these instruments

contained a call for the Wiley Davis Northeast corner, which in itself would have included the road, and the called distance of 440 yards extended to the edge of the large public road in use when the lease was executed, and no mention was made in the instrument of a reservation of title to the road. Any intention on the part of the Rogers heirs to reserve title to the road must be gathered from the conversation they had in 1899 when the survey was being made and not from the deed.

Authorities holding title to road passes unless expressely reserved in the deed.

One of the earliest Texas cases is that of *Mitchell v. Bass (1862), 26 Tex. 372*, wherein the court said:

> "The established doctrine of the common law is, that a conveyance of land bounded on a public highway, carries with it the fee to the center of the road, as part and parcel of the grant. **Such is the legal construction of the grant, unless the inference that it was so intended, is rebutted by the express terms of the grant.** The owners of the land on each side, go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Upon the discontinuance of the highway, the soil and freehold revert to the owner of the land." (p. 380.)

In *Cantley v. Gulf Production Co., — Tex. —, 143 S. W. (2d) 912*, the court held:

> "In the recent case of Cox v. Campbell, Tex. Sup., 143 S. W. (2d) 361, this Court reviewed

this question and the decisions relating thereto and reiterated the following general rule: 'The rule has been definitely announced in the Warwick and Weed cases that where a deed conveys by specific field notes land abutting on a street or public highway or railroad right of way, it conveys title to the property to the center of the street, public highway, or railroad right of way; and such rule is not overcome even though the field notes describing the land stop at the side line of the street, public highway, or railroad right of way, unless a contrary intention is expressed in plain and unequivocal terms." (at page 915.)

In *Texas Bitulithic Co. v. Warwick (Tex. Com. App.), 293 S. W. 160*, the court said:

" 'This court has approved the doctrine that to exclude half of the highway from a conveyance the grantor must make his purpose to exclude clear by **express declaration,** or equivalent of express declaration, **in the instrument.**' In the case of Tousley v. Galena M. & S. Co., 24 Kan. 328, the opinion was written by Justice Brewer, later of the United States Supreme Court. In the Galena case he held that, unless the road or street be expressly excluded, the grantee takes to the center thereof." (pp. 162-163.) * * *

"We quote as follows from the case of Marsh v. Burt, 34 Vt. 289:

" 'Parties have the right to make their conveyances as they choose, and when the intention to exclude the highway is clear, explicit and unequivocal, it is the duty of the court to carry out their intention, but **when the language is such that by a fair construction the intent is doubtful,**

> **it is the duty of the court to resolve that doubt so as to give to the deed the effect of conveying the land to the center of the highway.'** (p. 163.)" * * *

> "Therefore we think the courts are exactly right when they say that a deed does carry the property to the center of the adjoining street unless such deed contains a clause which **expressly declares the contrary intention** or contains some other declaration equivalent to such an express declaration. **In other words, we think that the purchaser of a lot should be put definitely upon notice that he has no rights in the sidewalk and street in front of his property, if that is the intention of the grantor. * * *.**" (p. 164.)

Mr. Associate Justice Sharp, speaking for the Supreme Court of Texas, in *Cantley v. Gulf Production Co., supra,* stated the reason for the above rule as follows:

> **"It is well known that separate ownership of long, narrow strips of land, distinct from the land adjoining on each side, is a fruitful source of litigation and disputes. To avoid this source of contention, it is presumed that a grantor has no intention of reserving a fee in a narrow strip of land adjoining the land conveyed when it ceases to be of use to him, unless such fee is clearly reserved. The reason for the rule is obvious. Where it appears that a grantor has conveyed all land owned by him adjoining a narrow strip of land that has ceased to be of any benefit or importance to him, the presumption is that the grantor intended to include such strip in such conveyance; unless it clearly appears in the deed, by plain**

and specific language, that the grantor intended to reserve the strip. See Cox v. Campbell, Tex. Sup., 143 S. W. (2d) 361; Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391; Texas Bitulithic Co. v. Warwick, Tex. Com. App. 293 S. W. 160. For an annotation of the decisions bearing on this question, see also 123 A. L. R. 543, 47 A. L. R. 1277, and 2 A. L. R. 7." (143 S. W. (2d) at page 915.)

In *Roxana Petroleum Corp. v. Sutter (8 C. C. A. Kan.), 28 F. (2d) 159,* the court held that the title passed to the road **"unless the intent not to do so be clearly indicated."**

The same decision was reached in *Shell Petroleum Co. v. Hollow (10 C. C. A. Kan.), 70 F. (2d) 811,* and *Roxana Petroleum Corp. v. Corn (8 C. C. A. Kan.), 28 F. (2d) 168.*

In *Lewis et al v. East Texas Finance Co., et al, — Tex. —, 146 S. W. (2d) 977,* the court held that an instrument conveying land definitely described therein, but excepting from the conveyance a road or the right of way across the land, conveyed the fee to the entire tract and the exception operated only to render the conveyance subject to the easement. In that case the deed contained the clause **"not including the road"** and the court held that the deed was unambiguous and parol evidence was not admissible to show that the grantors intended to reserve title to the road.

Texas decisions could be multiplied holding that the servient estate in roads, railway rights of way, etc., pass with a conveyance of the fee to the abutting tract of which the strip formerly was a part, unless

there is an **express reservation** in the deed, some of which cases are *Cantley v. Gulf Production Co. 118 S. W. (2d) 448; Bolton v. Dyck Oil Company, 114 S. W. (2d) 299; Weiss v. Goodhue, 102 S. W. 793 (writ refused); Gulf Sulphur Company v. Wyman, 221 S. W. 310; Gulf Production Co. v. Warren, 99 S. W. (2d) 616 (writ refused); Guadalupe County v. Poth, 163 S. W. 1050; Amerman v. M. K. & T. Ry. Co., 182 S. W. 54 (writ refused).*

Since the road was entirely laid out on land belonging to the four Rogers heirs the title to the entire strip passed to J. F. Rogers. *(9 C. J., sec. 97, p. 203; 4 R. C. L., sec. 8, p. 79; 2nd Ed. Devlin on Deeds, p. 312; Gulf Sulphur Co. v. Wyman, 221 S. W. 310, 312; Cantley v. Gulf Production Co., 118 S. W. (2d) 448, 450, affirmed — Tex. —, 143 S. W. (2d) 912.)*

The same principle is applicable **to alleys and private ways** *(Weiss et al v. Goodhue, 102 S. W. 793 (writ refused); Guadalupe County et al v. Poth et al, 163 S. W. 1050; Pecos & N. T. Ry. Co. et al v. Falls, 96 S. W. (2d) 430; Paine et al v. Consumers, Forwarding & Storage Co. et al (6 C. C. A. Ohio), 71 Fed. 626, 58 A. L. R. 238; 9 C. J., sec. 107, pg. 205),* **and applies to partition deeds** *(Amerman et al v. M. K. & T. Ry. Co., 182 S. W. 54 (writ refused); Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080; Cantley v. Gulf Production Co., 118 S. W. (2d) 448),* **and the oil and gas leases** *(Rio Bravo Oil Co. v. Weed, supra; Cantley v. Gulf Production Co., supra; Bolton v. Dyck Oil Co., 114 S. W. (2d) 299 (writ dismissed); Gulf Production Co. v. Warren, 99 S. W. (2d) 617 (writ refused); Roxana Petroleum*

Corp. v. Sutter (8 C. C. A. Kan.), 28 Fed. (2d) 159), and the owner of an oil and gas lease on such servient estate can maintain an action in trespass to try title or remove cloud. (*Gulf Sulphur Co. v. Wyman,* 221 S. W. 310.)

Failure to mention road in conveyance does not militate against conclusive presumption.

The Circuit Court in holding that J. F. Rogers did not acquire title to the road under the partition deed, said: "Since the deed as prepared said nothing about a road as a boundary there was no occasion to make a reservation of the land." None of the many Texas cases cited above hold that a road remains with grantors if not called for in the deed, but on the other hand hold title passes if the called distance extends to the edge and the road is not expressly reserved in the deed.

In *Magnolia Petroleum Co. v. Caswell, 295 S. W. 653,* reversed on other grounds, *1 S. W. (2d) 597,* the Court of Civil Appeals, quoting with approval the rule as announced in *Corpus Juris,* said:

> **"It is also said that failure to mention street or highway does not prevent the above rules operating. It is thus said in 9 C. J. 199, sec. 89: 'The general rule that the grantee of land bounded by a street or highway takes to the center thereof is not affected by the fact that the land is not described in the deed as bounded on the highway, provided it is actually so bounded. The presumption that it was not the intention of the grantor to withhold his interest in a street or**

highway to the middle of it, after having parted with all his right to the adjoining land, is just as strong as if the conveyance had expressly mentioned the street or the highway as a boundary." (295 S. W. 659.)

Many cases from other jurisdictions hold contrary to the rule announced by the Honorable Circuit Court of Appeals, some of which are as follows: *9 C. J. 199, sec. 89; 11 C. J. S. 581, sec. 35A; 7 Tex. Jur. 131, sec. 11; Annotation 2 A. L. R. 6, 31, sec. Vg; 47 A. L. R. 1276, Vg; Annotation 17 L. Ed. 818; Thompson on Real Property, sec. 3202, Note 60; Magnolia Petroleum Co. v. Caswell (Tex. Civ. App.), 295 S. W. 653, 659, reversed on other grounds, 1 S. W. (2d) 597; Roxana Petroleum Co. v. Sutter, 28 Fed. (2d) 159; Merchant v. Grant, 26 Cal. App. 584, 147 Pac. 484; Florida Southern Ry. Co. v. Brown, 23 Fla. 104, 1 So. 512; Bowers v. Atkinson, T. & S. F. Ry. Co., 119 Kan. 202, 42 A. L. R. 228, 237 Pac. 913; City of Springfield v. Eisenmeyer, Mo. Ct. App. 297 S. W. 460; Grant v. Moon, 128 Mo. 43, 30 S. W. 328; Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33; Cross v. Talbot, 121 Ore. 270, 254 Pac. 827; Durbin v. Roanoke Bldg. Co., 107 Va. 753, 60 S. E. 86; Norcross v. Griffith, 65 Wis. 599, 27 N. W. 606, 56 Amer. Rep. 42; Wegge v. Madler, 129 Wisc. 412, 109 N. W. 223, 116 Amer. St. Rep. 953.*

The rule is well stated in *Cross v. Talbot, 121 Ore. 270, 254 Pac. 827*, wherein the court said:

"We are of the opinion, and we take it that the weight of authority is to the effect that, where the land described by metes and bounds actually

> **abuts upon the highway, the grantee, in the absence of some clear intention on the part of the grantor to otherwise limit the description, will take to the center of the highway to the same extent that he would had the highway been actually mentioned as a boundary." (254 Pac. 828.)**

In *Van Winkle v. Van Winkle (New York Appeals 1906), 77 N. E. 33*, the court said:

> **"Where a deed gives the boundaries of the land conveyed by courses and distances, without mentioning a street by which the same is bounded on one side, but where it appears that the distance given does, in fact, carry the boundary to the street and along it, it is the same as though the boundary were described as running to the street and along the same, thus extending the title to the center." (77 N. E. pp. 35-36.)**

The Circuit Court of Appeals has cited no authority supporting its holding on this question. At the conclusion of the paragraph dealing with the road it cited *11 C. J. S. "Boundaries," sec. 35 (4)*. We have examined carefully this citation and we fail to find support in the court's opinion. On the other hand the text announces a contrary rule (*11 C. J. S. "Boundaries," sec. 35A, page 581)*, citing among other cases *Cross v. Talbot*, quoted from above, stating that the general rule is the title passes even though "the land is not described in the conveyance as bounded on the highway."

It is immaterial that the travel was not over the entire 66 feet.

Even though all of the 66 foot strip was not being used as a road at the time of the partition, it was set aside for road purposes for the benefit of the heirs and their grantees and therefore title passed. Respondents pleaded that at the time the partition was made the 66 foot strip was being used as a logging road and the heirs purposely left the strip unpartitioned so that at all times they would have an open outlet. (R. 34-35 ¶ 10-11.) F. E. Rogers, one of the heirs who accompanied the surveyor, testified they were using the 66 foot strip for a road at that time of the year, they having a sawmill on their land (R. 222). He testified:

> "Since the division between the heirs and the establishment of the 440 yard corner at the North and the establishment at the corner where the gear wheel is located, **a road has been open for the use of anyone who wanted to travel it.** To my own knowledge, J. E. Rogers, Mrs. Waskom and Mrs. L. J. Rogers never claimed that road as against the children of Alexander Rogers. Up until the time the Empire filed this suit I had never known of anyone claiming this road as against us." (R. 223-224.) * * *
>
> "I have lived all my life not very far from the tract. I knew it was cleared out. **I expect the road was fifty or sixty feet wide between Dink's West fence and Davis fence in the old days."** (R. 227.)

The road was an ordinary country one, the travel-

ling public having meandered back and forth between the trees in such a way as to avoid the washes caused from heavy rains (R. 244-246). When petitioner acquired its oil and gas leases the fences were at least 60 to 70 feet apart although the road did not take up all of this area.[1] The character of the road from the time of the partition until long after the discovery of the East Texas Oil Field was described by F. E. Rogers (R. 222-224, 226-227); in fact he testified that since the partition and establishment of the corner where the gear shaft was located **"the road has been opened for the use of anyone who wanted to travel it** (R. bottom 223, top 224), and that up until the time petitioner filed the suit he had never known of anyone claiming the road against the heirs (R. top 224).

The road was further described by witnesses (Simmons (R. 244-246)[2]; Sport (R. 239-241)[3]; York (R.

---

[1]Bearing in mind the Texas rule announced in *Texas Bitulithic Co. v. Warwick, 293 S. W. 160,* **"that the purchaser of a lot should be put definitely upon notice that he has no rights in the sidewalk and street of his property, if that is the intention of the grantor,"** there was nothing in the partition deed to put petitioner on such notice, and the strip was being used for road when it acquired its lease. Applying equitable principles petitioner should not suffer for defendants' mistakes.

[2]"The roads meander back and forth in between those trees and at the exact spot I do not know whether there is any road or not. The road would wash on one side and then they would get on the other side." (R. 246.) "The road is traveled one place one time and another place another time." (R. 244.)

[3]"The fences must have been at least sixty or seventy feet apart but the road did not take up all the land, however. The road was cut out twenty-five, thirty or forty feet wide. It did not go plumb straight when it was originally cut out. Davis' fence was back ten, fifteen or twenty feet from the West line of the road. * * * Wiley Davis had a fence on the West side of the road running clear up to the school house lot. I do not think, in 1930, before the road was widened, Davis and Rogers' fences were within forty-five feet of each other. I did not measure them. I was road overseer and people went over the road. In my judgment they were

195-196); Baker (R. 123, 125, 135)[4]; and Leuty (R. 152-153).

We do not contend that since 1899 each and every square foot of the 66 foot strip has been travelled over daily. Even though at times of the year the travel was confined to the furtherest edge of the road, does not mean the strip was not a road. As defined by Webster's New International Dictionary, a road is a place where one may ride and we believe a road includes the footpaths, drainage ditches and all other portions of the area set aside for public or private use.

The Texas rule is stated in *39 Tex. Jur. "Streets," sec. 6, page 515,* as follows:

> "Nor is it essential that the public use the entire width of a dedicated street in order to preserve its rights to the same; and the fact that the street is not graded or worked or used for travel to its full width as dedicated does not affect the right of the public to use its entire width as dedicated or the effect or extent of the dedication and acceptance." *(39 Tex. Jur., p. 515, sec. 6.)*

In *Bruner Fire Co. v. Payne, 118 S. W. 602,* the Texas Court of Civil Appeals said:

> **"The effect of appellant's contention is that, to preserve its rights to a highway, the public must**

---

sixty or seventy feet apart. After the fences were put there the road was widened." (R. 239-240.) * * * "It was almost in the road. The road wobbled quite a little bit." (R. 241.)

[4]"When I was there the road was about 60 feet wide and it was a well graveled and muchly traveled road at that time." (R. 123.)

> **use for purposes of travel every foot of it. This is not the law."** (p. 605.)

The Texas courts have said that the title passes, it being immaterial that the road was never opened or that it was abandoned. *(Amerman v. M. K. & T. Ry. Co., 182 S. W. 54; Texas Pacific Railway Co. v. Chandler, 20 S. W. (2d) 380; Cantley v. Gulf Production Co., 118 S. W. (2d) 448, 450; Temple v. Sanborn, 91 S. W. 1095.)*

In *Emerson v. Bedford, 51 S. W. 889 (writ refused)*, the court said:

> **"It seems, however, that these streets were never opened and used or otherwise accepted by the public; but that did not affect the rights of the subsequent grantees of the blocks, taking conveyances with reference to the streets."** (p. 890.)

In *Loud v. Brooks, 241 Mich. 452, 217 N. W. 34*, the court reviewed numerous cases where the facts showed the road had not been opened or abandoned and stated that their research had discovered only two cases holding title did not pass if the road was not opened, one being a New Jersey case and the other a Maine case. It cited many cases holding the contrary rule and held that the better rule was that a conveyance of land bounded by a highway, street or alley, carried with it the fee to the center thereof, subject to the easement, provided there were no words in the deed showing a contrary intent whether the dedication of the highway, street or alley had been accepted or not or had been opened or not.

In *Paine v. Consumers Forwarding & Storage Co. (6 C. C. A. Ohio), 71 Fed. 626,* Justice Taft said:

> "First, it is said that the principle is never applied except when there is an actual public highway forming a visible monument. The case of Hopkinson v. McKnight, 31 N. J. Law 427, is relied upon to sustain this proposition. The weight of authority is, however, decidedly to the contrary. In the case of Stark and Wales v. Coffin, 105 Mass. 328, it was held that a deed conveying part of a tract of land as bounded 'by a passageway of fifteen feet wide,' leading across the tract, with no restriction or controlling words, passes the fee to the center of the way so assumed as a monument, although no such way existed at the date of the deed, or has ever been fenced off, and although the deed provided that the passageway was to be held in common forever by the parties to the deed." (p. 630.)

X.

Federal Courts follow state courts on construction of deed, and rules of evidence.

In construing the partition deed to J. F. Rogers and the oil and gas lease held by petitioner on questions concerning the amount and location of the land conveyed the Federal Court should have followed the decisions of the Texas Supreme Court (*Kuhn v. Fairmont Coal Co., 215 U. S. 349; Massachusetts v. New York, 271 U. S. 65).* **Likewise it should have followed the decision of the state court on questions in-**

volving the admissibility of evidence (*Olcott v. Bynum, 17 Wall. 44*), **because the Texas decisions constitute rules of property** (*Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458*). **The fact this is an equitable action does not militate against the rule** (*Ruhlin v. New York Life Insurance Co., 304 U. S. 202; Mason v. U. S., 260 U. S. 545*).

It is respectfully prayed that writ of certiorari be granted and that upon hearing of this cause, the judgments below be reversed and judgment rendered for petitioner for the land involved, together with such other relief as it may be entitled to, either at law or in equity.

CLAYTON L. ORN,
Fort Worth, Texas,
DAVID B. TRAMMELL,
Fort Worth, Texas,
Attorneys for Petitioner.

A. M. EBRIGHT,
HAYES McCOY,
Bartlesville, Okla.,
H. J. PATTERSON, Austin, Texas,
PHILLIPS, TRAMMELL, ESTES,
EDWARDS & ORN, Fort Worth, Texas,
Of Counsel.

CLAYTON L. ORN, one of counsel preparing the foregoing brief and petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same and that such petition and brief are not interposed for delay.

CLAYTON L. ORN

APR 9 1941
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

No. 834

CITIES SERVICE OIL COMPANY,
Petitioner,

vs.

B. P. DUNLAP, ET AL.,
Respondents.

OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

ANGUS G. WYNNE,
Longview, Texas,
Attorney for Respondents.

WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas, Texas — Phone 2-4091

INDEX

	Page
Preliminary Statement	1
The Judgment Below in the Light of the Law of Texas, under the Findings of Both Courts	2– 5
Résumé of Pertinent Facts, Findings and Conclusions	5–26
Considered under the Law Governing Partition	26–30
Parol Partition	28–30
Petitioner's Cited Authorities Differentiated and Shown Inapplicable	30–31
The Only Issue Properly Presented by the Petition Stands Uncontroverted	31–32
Conclusion	32

Page

68 A. L. R. pages 5 and 15 et seq. 4
Simonds et al. v. Stanolind Oil & Gas Co. et al., 114 S. W. (2d) 226 (234) 10
Hennessy et al. v. Blair, 107 Tex. 39, 173 S. W. 871, 872 11
York v. McNutt, 16 Tex. 14 11
Chew v. Barnett, 12 L. & R. 380 11
Gilmore v. O'Neil, 107 Tex. 18, 173 S. W. 203 12
Standefer v. Vaughan (Tex. Civ. App.), 219 S. W. 484 13
Beck v. Gulf Production Co., 113 S. W. (2d) 258 (W. E. refused) 13
Carlisle v. King, 103 Tex. 620 ..... 14, 16, 17
Swenson v. Willsford, 84 Tex. 424 14
Miles v. Sherwood, 84 Tex. 485 14
Ayres v. Harris, 64 Tex. 299 14
Blake v. Pure Oil Co., 100 S. W. (2d) 1009 (1012) 14
State v. Sullivan, 92 S. W. (2d) 228 (233) 15
Humble Oil & Refining Co. v. State (Tex. Civ. App.), 104 S. W. (2d) 174 (179) 15
Wilson v. Garaud, 111 Tex. 253, 231 S. W. 1074 (1078) 15
Miller v. Lemm (Com. App.), 276 S. W. 211 17
Humble Oil & Refining Co. v. Ellison, 132 S. W. (2d) 395 (Com. App., approved by Sup. Ct.) 18, 19, 22
George v. Thomas, 16 Tex. 74 ..... 18, 22
69 A. L. R. 1491 22
69 A. L. R. 1433 30
Johnson v. Archibald, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27 30
Gill et al. v. Peterson, 86 S. W. (2d) 629 (631) 22
Stanolind Oil & Gas Co. v. State (Sup. Ct.), 129 Tex. 547; 101 S. W. (2d) 801 ..... 25, 26
Houston Oil Co. of Texas et al. v. Kirkindall et al., 145 S. W. (2d) 1074 ..... 26, 29
Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69 30
Miller v. Southland Ins. Co. (Tex. Civ. App.), 68 S. W. (2d) 558 30
Gulf Production Co. v. Baton (Tex. Civ. App.), 108 S. W. (2d) 960 30
Swann v. Mills (Tex. Civ. App.), 219 S. W. 850 30

In the

Supreme Court of the United States

No.....

CITIES SERVICE OIL COMPANY,

Petitioner,

vs.

B. P. DUNLAP, ET AL.,

Respondents.

OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Co rt of the United States:

The only issue properly before this Court under the petition is the asserted error of the Circuit Court of Appeals in finding that the call in the description in question for the W. H. Rogers line was not a call for a controlling monument and did not control the distance call.

As the facts and findings necessary to the determination of such issue are likewise involved in the review of the judgments below in the light thereof, in response to the cases and arguments of petitioner, respondents believe the latter course will more readily reveal the futility of the petition as a whole.

THE JUDGMENTS BELOW, IN THE LIGHT OF THE LAW OF TEXAS, UNDER THE FINDINGS OF BOTH COURTS

Petitioner here seeks to present as the law of Texas that, in some manner not revealed, a mere barren plea or claim of bona fide purchaser places an ambiguous boundary description beyond the purview of the established rules of construction and completely bars any inquiry or evidence as to the intent of the parties with respect thereto.

In other words, petitioner's position is and has always been that, having assumed itself a bona fide purchaser under its own interpretation of the ambiguity in question, neither evidence nor law properly applicable thereto can divest it of such asserted status.

Petitioner seeks to assert this barren claim against the conclusive findings of the courts below, mostly derived from its own evidence. The adjoinder upon which it solely relies for its claimed status of bona fide purchaser is at variance with the called distance, at variance with two other calls in its description, and at variance with the contiguity of its parcel of the partition with the other parcels thereof. It is at variance with the possession and acquiescence of its own lessors for more than thirty years—evidenced by a fence for some twenty years and by a large iron monument marking its southwest corner for more than twenty-five years. Its contended adjoinder call could not be respected without leaving an unpartitioned area between its tract and other parcels of the partition as surveyed on the ground according to its own evidence. Said contention is also at variance with the actual survey on the ground and the stakes set by the surveyor for

the partition. Further petitioner contends the line was never surveyed, and there being proof in the record and a finding by the Court as to a parol agreement which would determine such boundary as contended by respondents and as found by the Court, which parol agreement has been evidenced by possession, fence and iron monument (Exhibit 39, R. 297) for more than thirty years, petitioner could not claim contrary thereto and is bound thereby, even without other notice than that disclosed by such possession, and even though such line were entirely contrary to its ambiguous deed. These facts are reflected in the findings and conclusions of the trial court; are abundantly supported by the record; most of them were derived from petitioner's own evidence, and none of them have in anywise been questioned or repudiated by the Circuit Court of Appeals as obviously or in anywise wrong. The finding of the trial court as to the ambiguity upon which it admitted extrinsic evidence (Finding No. 19, R. 69) was not excepted to by petitioner as factually wrong, or not supported by the evidence. Upon the other hand, the Court expressly states it was derived from petitioner's evidence alone.

Upon such a record, petitioner insists before this Court, as the law of Texas, that its thus obviously barren plea of bona fide purchaser completely inhibits any application to such evidence and findings of the established rules of law relative thereto; that its plea alone gives it title—ex parte, conclusive, fiat and final.

It is hardly needful for respondents to emphasize that such a strange and alien doctrine is nowhere reflected in our jurisprudence. As a matter of fact, the authorities

are so abundant and unanimously hostile to petitioner's contention as to reflect profound doubt it would have been urged in our own courts. Whether born of unwarranted zeal or a desperate hope of judicial hebetude, response to it is a duty apologetically undertaken and one which can be pursued only in embarrassing and mounting consciousness it might be construed as unwarranted deference to the latter unflattering implication.

This case involves no such incredible misapplication of the law of Texas as the petition seeks to present. As a matter of fact, the whole controversy is extremely simple in outline, involving naught but anciently determined and still valid and subsisting principles of law of almost universal application, which have governed such cases from the very beginning of Texas jurisprudence.

Upon the evidence properly admitted to explain the ambiguities in petitioner's leasehold title description, both courts below held that petitioner thereby acquired no interest whatsoever in the land in controversy, which was tantamount to a factual finding by said courts that petitioner was not a purchaser thereof, bona fide or otherwise.

Rather than burden the Court with an extensive presentation of the multitudinous authorities on the admissibility of parol evidence to interpret a latent ambiguity or a vague, uncertain and indefinite description of land, respondents call to the attention of the Court the brief and annotations set forth in **68 A. L. R., pp. 5 et seq. and pp. 15 et seq.**, in which it will be noted that in support of the general rule there stated more cases are cited from Texas than from any other State. Thus it will be manifest to

the Court that in this case it is not called upon to consider or apply the unfamiliar rule and interpretation presented in the petition and supporting brief herein.

RESUME OF PERTINENT FACTS, FINDINGS AND CONCLUSIONS

Petitioner brought this action in the district court to quiet title, alleging the land in controversy to be a part of its leasehold estate, being Lot No. Two of the partition of the Louisa Rogers Estate, as described in paragraph II of petitioner's Amended Bill of Complaint (R. 21). No plea of bona fide purchaser was involved in petitioner's suit, but such plea was by it defensively interposed in paragraph IV of its Reply to respondents' cross-action (R. 43).

From petitioner's own evidence, the trial court found petitioner's title description was latently ambiguous. In its Finding of Fact No. 19 (R. 69), the Court states:

> "The Court finds as a fact that the surveyors of the complainant testified that there was an ambiguity in the partition deed and in the lease of the complainant when it was attempted to be applied to the ground, and, **upon such admission of ambiguity,** the Court heard evidence as to the footsteps of the original survey at the time of the partition and as to the intent of the parties in making such instrument."

As respondents have stated, such finding was not excepted to by petitioner as factually wrong or in any measure against the weight of the evidence.

From the evidence so admitted, the Court made full findings of fact and conclusions of law (R. 58-72) none of which are mentioned in the petition before this Court and

none of which were in anywise questioned, criticized or repudiated by the Circuit Court of Appeals as obviously or in anywise wrong. Said Circuit Court of Appeals contented itself with a still further purported finding of ambiguity which is the sole basis of petitioner's case before this Court.

As none of the undisturbed findings and conclusions of the trial court are presented in the petition herein, though most are indispensable to a consideration thereof, they should all be read and considered; however, more especially vital for consideration in said behalf are those referred to and fully quoted below:

FINDINGS OF FACT

No. 7 (R. 62, 63 and 64): "Detailed findings as to actual survey made.

No. 9 (R. 65, 66): "Replacing Surveyor's stake with massive gear-shaft and pinion wheel, at southwest corner of Petitioner's Leasehold and between it and the land in controversy (Photograph, Exhibit 39, R. 297).

Nos. 14 and 15 (R. 67-68): "That neither petitioner nor its lessors, by their deed and lease acquired any interest in the land in controversy.

No. 16 (R. 68): "That adjoinder call upon which petitioner solely relies was a mistake.

No. 19 (R. 69): "Finding of ambiguity hereinbefore quoted (not excepted to as factually unauthorized)."

CONCLUSIONS OF LAW

No. 2 (R. 69): "That adjoinder call on which petitioner solely relies for title should be rejected as in

conflict with remainder of title description and partition as a whole, and with subsequent interpretation, conduct and acquiescence of parties thereto for more than 30 years.

No. 3 (R. 70): "That Respondent Dunlap is entitled to have his title to such tract of land quieted as against complainant on his plea for affirmative relief."

Conclusion No. 4 is so vital and comprehensive it is necessary to set it forth in full (R. 70-71-72).

"4. The Court concludes that extrinsic evidence was admissible to show that the Surveyor Simmons, at the time he made the partition survey, placed a stake at a point 880 yards west of the northeast corner of the said Thomason Survey for the northwest corner of the J. F. Rogers tract, and another stake 880 yards south thereof at a point now, **and for more than 30 years, located by the old gear wheel."** (Marking the southwest corner of petitioner's lease and between it and the land in controversy). "Also, extrinsic evidence was admissible to prove that one of the stakes was removed and the gearshaft placed where said stake was originally driven, as the Court concludes that the correction lease obtained either does not cover the 66 feet involved in this controversy or it takes in more land than it was represented to cover at the time it was obtained.

"The correction lease and the original lease, separately and taken together, when application of the calls is made to the land on the ground, create an ambiguity and, when taken in connection with the description of the partition deed to J. F. Rogers, create an ambiguity. If effect is given to the call 'thence west 440 yards to the northeast corner of the Wiley Davis

tract; thence south 880 yards; thence east 224 yards; thence north 310 yards at 12 deg. E. of north; thence East 154 yards to W. H. Rogers' line; thence North to the beginning, IT WOULD LEAVE OUT A STRIP OF LAND 68 FEET WIDE WEST OF THE J. F. ROGERS OLD FENCE, **along the line North 310 yards at 12 deg. E. of North, for, if you run from the southwest point, as claimed by the complainant herein, at a point 880 yards south of the northeast corner of the Wiley Davis tract of land, and then run East 224 yards (the call in the original partition deed and in the original lease to W. P. Chandler and in the assignment from Chandler to the complainant), there will be 68 feet between J. F. Rogers' fence and the call distance; then to run north 310 yards at 12 deg. east of north, there will be 68 feet between the line as called for and as surveyed and the fence line of the Rogers tract of land.** THIS AMBIGUITY, FROM ALL THE FACTS, COMPELS THE CONCLUSION THAT THE INTENTION OF THE PARTIES WAS NOT TO TAKE IN THE 68 FEET WEST OF THE GEAR WHEEL, IN CONTROVERSY, AND THAT IT WAS PURPOSELY LEFT OUT OF THE PARTITIONED LAND. Furthermore, when the complainant, Empire Gas & Fuel Company, represented to the heirs of J. F. Rogers that their correction lease did not cover any more land than the original lease, and thereby obtained the same, it is in no position now to claim otherwise, in an equitable action. IN OTHER WORDS, IF THE COMPLAINANT WERE ENTITLED TO RELY ON THE CALL TO THE WILEY DAVIS CORNER, AT THE NORTH, IT WOULD BE CONFINED TO THE CALL OF 224 YARDS EAST FROM THE POINT 880 YARDS SOUTH OF THE SAID CORNER, AND A STRIP OF 68 FEET WOULD BE OUTSIDE THE CALLS OF THEIR LEASE ALONG THE EAST SIDE THEREOF." (The

Court here continues with further elaboration of said ambiguity, but the foregoing will suffice for an adequate presentation).

Said quoted findings and conclusions of the trial court were derived from petitioner's own evidence alone. As a matter of fact, as the trial court shows, they are inherent in petitioner's own title description, taken in connection with the other partition deeds and its chain of title and facts petitioner was bound to know. So long as the law provides that parol evidence is admissible to explain and govern the interpretation of a latent ambiguity in a title description, any purchaser under such a description is obviously charged with knowledge of the facts revealed by the application of such title description to the ground. If his description will not cover land he thinks he is buying, a plea of bona fide purchaser will not include it.

Petitioner did not except to the correctness or factual support of the Court's aforesaid finding of fact, nor of the Court's said cited conclusions, but contented itself with excepting to the admissibility of parol evidence to explain the ambiguity found from its own testimony, and with excepting to the legal effect of the Court's stated conclusions, without questioning the factual foundation thereof or the evidential warrant therefor.

The findings and conclusions above quoted were not questioned or repudiated by the Circuit Court of Appeals as either obviously or in anywise wrong; said Circuit Court instead resting its judgment upon still further purported findings, of ambiguity, which, whether authorized or not, in nowise lessen the applicability of its affirmative judg-

ment to the ambiguity found by the trial court, as set forth above, which was not excepted to by petitioner as factually unsupported or in any measure against the weight of the evidence.

Upon said quoted findings and conclusions, the trial court, in its Decree (R. 52) first determined that petitioner in its own cause of action had shown "no right, title or interest" in the land in controversy, and so decreed; then, upon their cross-action, rendered judgment quieting respondents' title thereto.

Under the law of Texas, the Court, having first determined that petitioner by its lease acquired no title or interest in the land in controversy, by such stated determination conclusively negatived petitioner's plea of bona fide purchaser set up in its Reply to respondents' cross-action; and having so disposed of petitioner's case, there was no occasion for the Court further to pass upon petitioner's plea of bona fide purchaser in respondents' cross-action. As said by the Supreme Court of Texas in **Simonds et al. v. Stanolind Oil & Gas Co. et al.**, 114 S. W. (2d) 226 (234):

> "It is necessary to the successful assertion of their claim as innocent purchasers for value of the undivided one-half interest that passed to Margaret Simonds under the unrecorded deed that they show that they have acquired the apparent title or the legal title as appearing of record to that half interest. Waggoner v. Dodson, 92 Tex. 415, 422, 73 S. W. 517; Temple Lumber Company v. Broocks (Tex. Civ. App.), 165 S. W. 507, application for writ of error refused; 43 Tex. Jur., pp. 621-622, Sec. 366." (And, on page 235):

> "Having reached the conclusion that defendants in error failed to prove that they acquired the apparent record title to the undivided one-half interest in the land in controversy that was conveyed by Ellen Smith to Margaret Simonds, we need not determine whether the claim of innocent purchaser was defeated by the deed made by T. B. Weathersby to T. P. Campbell April 4, 1916, and duly recorded."

The foregoing has been the uniform holding of our Supreme Court, and it is thoroughly established in Texas that before the plea of bona fide purchaser can be considered such pleader must first have proved that he actually acquired the legal or apparent record title to the land in controversy. As said by Chief Justice Phillips of our Supreme Court in **Hennessy et al. v. Blair,** 107 Tex. 39, 173 S. W. 871, 872:

> "As a rule, the equity of an innocent purchaser is incapable of assertion without the ownership of the legal title. York's Admr. v. McNutt, 16 Tex. 13, 67 Am. Dec. 607; National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979."

Thus, the judgment of both courts below holding that petitioner did not by such adjoinder call acquire the legal title or apparent record title to the land in controversy, its plea of bona fide purchaser was out of the case. The protection of such plea extends only to such valid estate as the instrument relied upon unquestionably purports to convey. Such plea is seen, therefore, to be no stronger than the conveyance upon which it rests. As said by our Supreme Court in **York v. McNutt,** 16 Tex. 14, quoting from **Chew v. Barnett,** 12 L. & R. 380:

> "When it is asserted that a purchaser for a valuable consideration takes the title free of every trust or

> equity of which he has no notice, **it is intended of the purchase of a title perfect on its face; for every purchaser of an imperfect title takes it with all its imperfections on its head.** It is his own fault that he confides in a title which appears defective, and he does so at his own peril."

And in **Gilmore v. O'Neil,** 107 Tex. 18, 173 S. W. 203, our Supreme Court, in a case of striking similarity to the instant case, in which the plaintiffs were claiming as bona fide purchasers, defined the legal status of their claim as follows:

> "The claim of plaintiffs was predicated upon their asserted ownership of a leasehold supported by the legal title, because of the description in their lease. * * * **Essential to the allowance of their claim is the determination that the description in their lease was sufficient. * * * If their lease did not describe the land, the plaintiffs had no character of title."**

Obviously, therefore, if appellant placed its reliance upon a call for adjoinder which, under the description in question, must as a matter of law be ignored as a mistake, no plea of bona fide purchaser can emend its indiscretion; give sanction of title where none was legally purported, or impose upon appellees a burden of refutation more emphatic and conclusive than appellant's utter failure to acquire any title whatsoever to the land in controversy through the deed in question.

Petitioner attempts to make it appear the courts below, upon plea of mistake and against a bona fide purchaser, corrected such mistake by reformation of the deed after the lapse of more than 30 years, contrary to the law of Texas. These contentions are doubtless made from the

fact in their answer respondents did allege such called-for adjoinder was inserted in the J. F. Rogers deed by mistake at the time of the partition. But it must not be assumed the determination of the courts below was upon such equitable ground; there is ample authority to support the action of the Court without any implication of reformation.

As contended by petitioner, the law of Texas as to the interpretation of partition deeds is the same as that involved in systems or blocks of surveys, and it follows and adopts the Federal rule in that regard, as shown by petitioner's cited authority, **Standefer v. Vaughan** (Tex. Civ. App.), 219 S. W. 484. In this case and multitudes of others it is held that said field notes may not be interpreted to leave vacant and unsurveyed lands between said surveys. This has been held applicable, as well, to field notes of partitioned tracts. **Beck v. Gulf Production Co.**, 113 S. W. (2d), 258 (W. E. refused). Yet, consulting the findings and conclusions hereinabove quoted, it will be found that following petitioner's contention and giving effect to the adjoinder call in this case leaves an area of equal width to that in suit lying between petitioner's leasehold and Lot No. 3 of the partition; whereas, if such adjoinder is ignored as a mistake, said partition parcels remain contiguous and in perfect harmony.

Further, it is well settled in Texas that such a finding of ambiguity authorizes reversal of the calls in such an ambiguous instrument; and if from its called-for beginning point, the field notes of petitioner's lease and supporting partition deed are laid down upon the ground in reverse order the call for adjoinder is shown to be

wholly mistaken and such field notes are found to be in perfect harmony within themselves and in their relation to all the other parcels. This rule is most frequently applied in Texas in the construction of such ambiguous field notes. **Carlisle v. King,** 103 Tex. 620; **Swenson v. Willsford,** 84 Tex. 424; **Miles v. Sherwood,** 84 Tex. 485; **Ayres v. Harris,** 64 Tex. 299.

But there are many cases wherein the exact construction applied by the courts below was followed and for practically the same stated reasons. The Supreme Court in **Blake v. Pure Oil Co.,** 100 S. W. (2d) 1009 (1012), which involved an adjoinder call in a parcel of a subdivision, had this to say:

> "* * * it is our opinion that such mistaken call should be rejected and the block constructed by course and distance from the southeast corner of the Moore Survey, located in the position where Starr and his surveyor believed it to be * * * because under the facts in evidence such construction is **most consistent with the intention to be derived from the entire description and harmonizes the other terms of the field notes.** This construction is the same in effect as a construction of block 7 by course and distance from its southeast corner on the undisputed west line of the Walling survey, the location of which southeast corner is proven by evidence hereinafter discussed. **When block 7 is thus constructed, the lengths and courses of its lines are the same as those given in the field notes and shown on Starr's map, it has the acreage called for in the deed and marked on the map, and it does not conflict with block 5, block 6, or block 8, or with the Juan Prado Survey."**

And in **State v. Sullivan,** 92 S. W. (2d) 228 (233), the Supreme Court disposed of such an adjoinder call in conflict with the distance call and otherwise ambiguous, as in the instant case, as follows:

> "* * * where the facts conclusively show that the surveyor through mistake or by conjecture called for the adjoinder, the call for adjoinder does not control over course and distance, even though the line or corner called for was marked. In such situation the call for adjoinder will be rejected, as inserted by mistake, and controlling effect given to course and distance from known and undisputed corners, when under the facts of the particular case such construction of the survey is **'most consistent with the intention to be derived from the entire description.' This method of construction by the rejection of a call for adjoinder inserted by mistake is most consistent with the true intention if its effect is to harmonize the other terms of the field notes and to disregard as few of the calls as possible."** (Citing numerous cases).

The above language is quoted and followed in **Humble Oil & Refining Co. v. State** (Tex. Civ. App.), 104 S. W. (2d) 174 (179), approved by the Supreme Court (Writ refused).

That such a construction does not involve reformation, and is of legal application and not equitable, is manifest by the language of the Supreme Court in **Wilson v. Giraud,** 111 Tex. 253, 231 S. W. 1074 (1078), cited by the Circuit Court of Appeals in its original opinion, and likewise cited in those cases quoted from immediately above:

> **"Once testimony is adduced to establish an inconsistency in field notes, parol evidence which throws light upon which call is true and which call is false**

is admissible. The purpose of admitting the parol evidence is not to override that which is written, but to properly interpret it. Where it is impossible to give effect to all that is written, effect will be given to that which may be found to be true."

And when by such construction of the field notes in the deed, considered in the light of the adjoinders called for and the lines of the abutting surveys such field notes can be so harmonized and corrected without resort to a suit for reformation, it is held in **William Carlisle & Co. v. King,** 122 S. W. 581 (Affirmed and approved by the Supreme Court, 103 Tex. 625, 133 S. W. 241) that such a mistake cannot be relied upon to support a plea of bona fide purchaser. The Court of Civil Appeals held:

"In our judgment, however, it sufficiently appears from the face of the deed, when read in the light of such facts as appellants were bound to know—that is, the recitals in the patent to the land they were buying **and the lines of the abutting surveys called for in the deed**—not only that there was error in the field notes but what land, in fact, was intended to be surveyed. * * *

"We must be understood as clearly holding that unless the errors in the deed are of such a character that they can be corrected from the face of the deed, and a suit would not be necessary for this purpose (2 Pom. Eq. Secs. 866, 867, p. 1533, note) the record or filing for record of the deed would not be constructive notice to a subsequent purchaser; **but the converse of the proposition is equally true, and we hold that for this reason the defense of innocent purchaser cannot be sustained."**

And in the Supreme Court, under the same style, 103 Tex. 620, the Court adopted the rule stated by the Court of Civil Appeals and further amplified (page 624):

> "The filing of the deed for record from J. S. A. Chessher and wife to George Burns gave notice to subsequent purchasers of just what was embraced in the terms of the deed **by fair construction.** The rule of construction of deeds is 'that where there is an evident mistake in the calls the court must, if practicable, find out from the deed itself and correct errors so as to give effect to the deed.' Poitevent v. Scarbrough, 103 Tex. 111; Mansel v. Castles, 93 Tex. 414; Coffey v. Hendricks, 66 Tex. 676."

Of course in the instant case this language would be enlarged by the rule urged by petitioner, in that the partition as a whole would be considered and given effect, that not only the deed might be harmonized within itself but with relation to the other partition parcels, avoiding unpartitioned area between parcels of the partition.

The case of **Miller v. Lemm** (Com. App.), 276 S. W. 211, follows the opinion of the Supreme Court in **Carlisle v. King, supra,** quoting extensively therefrom.

The foregoing cases authorize and require the construction of appellant's title description by deleting or eliminating the adjoinder call under which appellant here claims, thereby revealing a wholly consistent description of appellant's leasehold estate, unequivocably applicable to the ground. When this can be done from the description and chain of title, considering the location of the adjoinder called for, as declared in **Carlisle & Co. v. King, supra,** appellant's lease and deed are held to be constructive notice

to it that it acquired no estate whatsoever in the land here in controversy, could not in law have contemplated it in its purchase nor in good faith claim it against the ancient legal estate of respondents, and for that reason its defense of bona fide purchaser cannot be sustained.

Traditionally, in Texas, quantity has been the least considerable of the elements involved in the determination of boundary lines. Originally, land was of negligible acreage value, and it seemed every other factor was of more importance and reflected more light upon the intention of the parties to a conveyance than did the element of quantity of land called for. But apparently our courts have begun to consider that oil and mining lands are of great acreage value; that they are bought and sold upon an acreage basis and not in bulk and often, as in the instant case, three or four acres of oil land are worth more than twenty-fire or thirty entire sections of land were worth at the time our courts first held quantity of land called for as of least moment in the location of a boundary. Multitudes of cases now reach our Supreme Court involving from a fraction of one acre to four or five acres of oil-bearing lands. In the case of **Humble Oil & Refining Co. v. Ellison**, 132 S. W. (2d) 395 (Commission of Appeals, approved by the Supreme Court), it appears the Court either holds that quantity is of greater importance than a call for a natural monument or that this is so where quantity is considered in connection with the element of long acquiescence, as will be presented in **George v. Thomas**, 16 Tex. 74. The acreage variance in the instant case is still greater than that in **Humble v. Ellison, supra**, and the period of acquiescence in the disputed boundary about the same—over thirty years in both cases.

In **Humble v. Ellison,** the question for determination was whether or not approximately nine acres of land was within or north of the north line of a tract called to be 224¾ acres. This 224-acre tract was described by field notes in which the beginning corner, at the southeast, and the corner at the southwest were calls for a creek, said creek being the south boundary of the tract. Giving effect to the called adjoinder with the creek at the southwest corner presented no conflict with any other call in the title description, but the Court found the acreage thereby included was approximately eight acres less than called for in the deed; wherefore the Court proceeded to reverse the field notes from the established southwest corner of the tract, on the creek, but found that the excess in the called length of the west line thereby included approximately eight acres **more** than called for in the deed. However, the Court found that some thirty-five years previously the original lessor, one Wooley, who was a defendant in error in the case, had constructed a fence along what he thought was the north line of the 224¾ acre tract, then owned by him, which fence was approximately half way between the north line as located by the field notes from the beginning corner on the southeast and the north line as same would be established by reversing the field note calls from the established southwest corner, and that Wooley had regarded said fence as his north line during said interval of time. The Court further found that when said fence was taken as the north line, the tract had approximately the 224 acres called for in the deed. Upon these facts, the Court states:

> "In such state of facts quantity becomes a material circumstance. * * * The adoption of that line (the

> fence line) as the true north line of the tract * * * not only gives to the tract of land conveyed by the deed the acreage that the parties to the deed intended that it should have, but it conforms to the construction placed on the deed by the grantee Wooley and his wife, who is a party plaintiff in this suit, thus giving effect to what clearly appears from the evidence to have been the intention and understanding of Wooley when the deed was made."

Plainly here is a case clearly and unmistakably holding that as small a variance as 3.9 per cent between the acreage called for in a deed and the quantity described by the field notes constitutes such an ambiguity as requires and authorizes parol evidence in the determination of a boundary. This is held in a case in which it is plainly manifested from the opinion there could not have been any other ambiguity in the description. Further, it will be noted, the Court in determining the boundary resorted to a construction altogether limited to the long acquiescence, held to be binding on Wooley and his vendees without other notice than the fence and possession in relation thereto during such period. In the instant case, aside from all the other grounds and rules we have presented, and shall yet present, there is a variance of 6% between the quantity called for and that required to meet the mistakenly stated adjoinder; and the period of acquiescence in the instant case was more than thirty years prior to any interest in petitioner or its assignor. Some twenty years of said period of acquiescence the same was evidenced by a fence built by petitioner's own lessors to mark their west line, and for more than twenty-five years was evidenced by large steel pinion and gear wheel, planted by petitioner's own

lessors, prior to which time said location, according to the evidence and findings of the Court, was marked by the original stake of the Surveyor who ran the partition lines in 1899. This evidence comes not only from F. E. Rogers, one of the original Louisa Rogers heirs who shared in such partition and was one of the chain-carriers on said survey, but from Seth Davis and J. E. Rogers who, at the request of the widow of J. F. Rogers, grantee of Lot No. Two in the partition, replaced the surveyor's stake at the southwest corner of said Lot No. Two with the large steel or iron monument above referred to, a photograph of which is shown as Exhibit No. 39, page 297 of the Record. During all of said time said monument has been recognized not only by petitioner's lessors, as marking their southwest corner, but by the owners of Lot No. Three, on the south, as their northwest corner. There is ample testimony in the record such monument was generally known in the community as marking the corners and boundaries aforesaid. When a land owner has planted a monument of the character in evidence in this case to mark a corner and such monument remains unquestioned for more than twenty-five years and is found in harmony with all the adjoining land, as well as all the distance calls in the owner's deed, and when forever subsequently he has confined his possession thereto, most obviously he meant **corner** and **boundary** and, after such a long period of acquiescence it has always been the law in Texas that irrespective of any variance with the description in question and without other notice than possession and occupancy during such period in relation thereto, his vendees cannot claim a boundary contrary thereto. (See An-

notation, and brief, 69 A. L. R. 1491, and Texas authorities cited under general rule).

From the very earliest time in Texas our courts have applied this rule, and the foregoing authority, **Humble v. Ellison,** manifests our Supreme Court yet holds to it. Frequently the language in the opinions is so vigorous in affirmance of the rule as to suggest the advocate instead of the jurist. We could use no stronger language against petitioner's claim of legal title and bona fide purchaser on the strength of an adjoinder call (at variance with the possession of its lessors; at variance with the called distance; at variance with a fence maintained by its lessors for some twenty years and with a large iron monument marking the accepted line, and at variance with the contiguity of the partition descriptions as a whole) than the language used by the Supreme Court of Texas in **George v. Thomas,** 16 Tex. 74 (90) upon a very similar state of facts:

> "The acquiescence of the parties under whom the plaintiffs claim for so great a lapse of time, under the circumstances, ought to bind them, if there were no evidence of the express assent and recognition of it by the plaintiffs' vendors. * * * The occupancy by the defendants upon it (the agreed line) was notice to them of their understanding of it; * * * they have **obtained all they bargained for** and have no cause to complain. They cannot set up the rights of the married women from whom they purchased, to maintain rights in themselves which their vendors neither asserted nor pretended to convey to them. They cannot complain that the former did not sell to them all they might have sold by insisting upon a different division. * * * They, in a word, have not shown the pretense of a right to come in, at this late day, and under

> their recent purchases to disturb the peace of the neighborhood and unsettle landmarks and boundaries that have been established and acquiesced in for nearly a quarter of a century. If suits of the character of the present were encouraged, the mischiefs to which it would lead, it may readily be conceived, would indeed be of serious consequences. But fortunately for the peace of society, the well settled principles of the law, no less than reason, justice and sound policy, forbid the courts to encourage or countenance by their sanction pretensions so adverse to private rights and the public tranquillity."

Not merely as another case on acquiescence, but as authority disposing of petitioner's contention that evidence as to stakes set by the surveyor which are not called for or mentioned in the field notes of the deed or lease is inadmissible, respondents quote pertinent elements of the opinion by the Commission of Appeals, adopted by the Supreme Court, in the case of **Gill et al. v. Peterson,** 86 S. W. (2d) 629 (631):

> "The mark or object is of no probative value if the field notes or grant contain no description of it or no reference to it **and there is no evidence directly connecting it with the work of the original surveyor.** But, on the other hand, when it is clearly shown that the mark was made or the object placed by the surveyor at the time he made his survey and for the purpose of marking a line or corner, then the object or mark has probative value (Citing authority). * * * Other authorities indicate that an object or mark not called for in the field notes is admissible to prove the location of a line or corner of a survey when such object or mark is 'identified by the surveyor who made the survey, **or by any other witness who was present with him at the time, as having been so placed to mark his foot-**

steps'" (Citing authorities). * * * "The obvious reason for this qualification of the rule is that testimony of the surveyor who made the marks or of some other person who was present when they were made is direct and primary evidence as to the place where the line of the survey was actually run."

And, as to acquiescence, on page 633 the Court says:

"A short time later they built their division fence on the east line as the surveyor had marked it and acquiesced in this line for nearly ten years. In view of these facts, the footsteps rule cannot be disregarded. Application of the other rules of construction to which reference has been made would defeat rather than make effective the intention of the parties."

The cases following the rule here urged are so numerous in our reports as to render it utterly futile and a mere annoyance to the Court to further discuss or refer to them.

Petitioner seeks to acquire title to the land in controversy upon the stated Texas rule of law that where a tract of land is partitioned among the joint owners, the presumption obtains that the whole land is partitioned, unless some portion thereof is expressly excepted.

The trial court has held and found that a proper legal construction of petitioner's field note description conclusively reveals that it was not the intention of the parties to include the land in controversy in the J. F. Rogers deed, but compels the conclusion it was the express intention of said heirs to exclude it therefrom (R. 71; this Opposition, pages 7-9).

Further, the testimony admitted to explain the ambiguity found in petitioner's title description (R. 222) and

the Court's Finding thereon (Finding No. 7, R. 63) conclusively reveal an express parol agreement of the parties, made in the course of the partition survey, to retain the land in controversy under common or joint ownership. As respondents will subsequently herein show, partition may be by deed or by parol, or it may be partly by deed and partly by parol; and the land in controversy having been so expressly segregated from the land covered by the partition deeds and its lines and corners having been marked, fenced and acquiesced in by the parties for more than thirty years prior to petitioner's purchase, petitioner cannot claim the land here in controversy upon the basis of any presumption or rule of legal construction, and under the law of Texas is bound by such parol agreement without other notice than the aforesaid manifested possession and acquiescence. Petitioner's contention that the line here in controversy was never surveyed (though wholly contrary to the evidence and findings) make the rules governing parol partition only more conclusively applicable against it.

But even in the absence of these facts and findings, sufficient in themselves, as a matter of law, to bar the application of petitioner's urged presumption, it does not follow that by such presumption the land in controversy would be added to the J. F. Rogers tract or petitioner's leasehold. If the adjoinder call is untenable, as held by the courts below, and the course and distance calls do not govern, as contended by petitioner and held by the Court, the law of Texas requires the equitable apportionment of any excess so found to be undivided. Petitioner therefore again finds itself shorn of claim and barren of right by the presumption urged, or otherwise. See Stano-

lind Oil & Gas Co. v. State, (Sup. Ct.) 129 Tex. 547; 101 S. W. (2d) 801, wherein the citation of authorities against a called-for adjoinder in that case largely duplicates those hereinbefore presented. So even this presumption urged by petitioner returns all rightful claim to the land in controversy to these respondents.

FROM THE STANDPOINT OF THE LAW GOVERNING THE INTERPRETATION OF PARTITIONS

While all the foregoing authorities are amply conclusive against petitioner, they are mainly derived from cases involving legal title and conveyance thereof. From the standpoint of one holding under a partition, the law of Texas is utterly hostile to every claim of petitioner before this Court. In the light of the last expression of our Supreme Court, inasmuch as **conveyance** of title is not here involved, petitioner is divested of any warrant for presuming or further contending it ever acquired any interest whatsoever in the land in controversy, and its blunderbuss pattern of legal presumptions and rules of conclusive legal construction are held insupportable under its equity approach to the jurisdiction of this or any other court, in a claim under a partition.

We here call to the attention of the Court the opinion of the Supreme Court of Texas, rendered January 1, 1941, in the case of **Houston Oil Co. of Texas et al. v. Kirkindall et al.,** 145 S. W. (2d) 1074, which just about sums up the law of Texas applicable to this case.

In that case the Kirkindall heirs attempted by deed to partition their inheritance, consisting of certain personal property and the land remaining after certain tracts had

been sold off the homestead 160 acres, which remnant was assumed to be 18 acres on one side of a road bisecting the estate. Unknown to the heirs, there also remained 25 acres on the other side of the road. For the stated consideration of the personal property, certain of the heirs deeded to the others their interest in said realty—the deed being void as to two of them, married women, because of defective acknowledgments. The land was therein described as ten acres and eight acres in a certain general vicinity, but was incapable of location by such description. Said particular description was followed by a general description purporting to include all the remaining land of said homestead. The Court held that, **if considered as a conveyance,** the specific description would be void and the general description would necessarily control—effectually conveying the uncontemplated additional 25 acres, being the land in suit.

However, the Court held the deed manifested on its face it was a partition and therefore, **not being a conveyance,** was not subject to the statute of frauds; further, on its face it disclosed **that there might be an ambiguity,** and, not being a conveyance, the deed was not subject to conclusive rules of legal construction, and parol evidence was admissible to locate the ten-acre and eight-acre tracts; that when this is done ambiguity is revealed in the description, which may be explained and resolved by parol evidence; that while the deed, considered as a conveyance, was void as to certain grantors, it nevertheless was effective as a **parol partition** and subject to the rules applicable thereto; that under said stated facts the grantees in said deed and those claiming under them could not be held to be bona fide purchasers of the 25 acres in suit.

In the instant case, the partition deed in question was not only not a conveyance, but, as respondents have shown by multitudinous authorities, even if it were considered as such it wholly failed to pass title to the land here in controversy.

Under the foregoing cited authority, **where is petitioner's legal title, asserted as a predicate for its suit in equity? And if it had no legal title to the land in controversy, nor held under a conveyance subject to conclusive rules of legal construction, how in equity does it stand before this court upon the petition here contested, challenging the legal integrity of the judgments brought in review upon a barren pretense, both exposed and refuted by the very law it seeks to ravish and claims to invoke—as presented by its final and ultimate exponent?**

PAROL PARTITION

As respondents hereinbefore have briefly stated (pages 24-26) the land here in controversy was set apart by the heirs by parol partition, to be owned in common and not included in their partition deeds (R. 222; Finding No. 7, R. 63). Without properly presenting this phase of the case, as reflected by the record, respondents in the Circuit Court of Appeals in their Argument and Authorities on remand, set forth the conclusive determinations of our courts, from the very earliest time to the present, that such a parol partition and parol boundary agreement and the possession and acquiescence in relation thereto over such a long period of time were permanently binding not only upon the parties thereto but upon their vendees, without other notice than disclosed by such possession, fenced and monumented boundaries and

long acquiescence. But the Circuit Court of Appeals, undoubtedly having in mind petitioner's action alone, held we were not concerned with parol partition but partition by deed. Respondents, however, call attention to the fact they had a cross-action in this case, involving the land in controversy only, which they were not claiming by deed but solely as determined by the expressed and long manifested intention of the parties, not only as reflected by the fact the land in controversy was not included, as a matter of law, in any of the partition deeds, but as fixed, as a part of the partition itself, by parol, and manifested by the possession, occupancy, fences and monuments and over thirty years' acquiescence by all the parties in relation thereto. The last case decided by our Supreme Court applicable to the instant case and partition by deed and parol was decided this year and is discussed immediately above —**Houston Oil Co. of Texas et al. v. Kirkindall et al.**, 145 S. W. (2d) 1074—disclosing that it is yet, as always, the established law of Texas that a partition may be by deed, by parol, or by both deed and parol; and the findings and evidence in the instant case amply manifest that the conclusive rules of legal construction by which petitioner alone seeks to acquire an estate it manifestly could not have contemplated in its purchase are not involved but expressly inhibited in a partition of land—and doubly so in a parol partition, evidenced by over thirty years' possession and occupancy in relation to boundaries plainly visible to any purchaser on the ground.

Respondents will not trouble the Court with a presentation and discussion of the multitudinous authorities holding a parol partition hostile to every claim of petitioner.

If there be any doubt about it the brief and annotations set forth thereon in 69 **A. L. R.** 1433 ought to resolve it.

PETITIONER'S CITED AUTHORITIES DIFFERENTIATED AND SHOWN INAPPLICABLE

The petition herein is predicated upon the asserted authority of four cases—**Garrison v. Crowell,** 67 Tex. 626, 4 S. W. 69; **Miller v. Southland Ins. Co.** (Tex. Civ. App.), 68 S. W. (2d) 558; **Gulf Production Co. v. Baton** (Tex. Civ. App.), 108 S. W. (2d) 960 and **Swann v. Mills** (Tex. Civ. App.), 219 S. W. 850. In the light of all the foregoing authorities conclusively adverse to petitioner, one would suspect there is something wrong with its presentation of the above authorities upon which alone it relies in this case. There is.

The first two of petitioner's above cited cases were plainly decided upon possession openly evidenced in the grantor, upon which alone the purchaser is universally held privileged to rely. The decision of the third case, **Gulf v. Baton,** rested on an agreed boundary—just another authority for respondents.

Petitioner's case of **Swann v. Mills, supra,** has no relation to the facts before this Court. There the Court carefully states the field notes under interpretation were unequivocably applicable to the ground as written; that there was **no ambiguity, either latent or patent,** and then the Court carefully differentiates such facts from the holding of the Supreme Court in the case of **Johnson v. Archibald,** 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27, which the Circuit Court of Appeals cited as authority in the instant case. But the Court went on further to declare that, in any

event, if there remained any outstanding equity the appellants, who derived title through an entirely different survey to the west, had not connected themselves therewith.

Without these differentiating facts none of petitioner's cited authorities on bona fide purchaser could stand. Certainly, it must appear our Supreme Court has consistently so differentiated and construed petitioner's cases, inasmuch as the use petitioner seeks to make of them is so utterly contrary to the plain and unmistakable import of that Court's multitudinously adverse decisions from its very beginning to the present. These four are all the authority petitioner has ever attempted to assert before any court in this case, and it has repeated and reiterated them in connection with every contention it has presented. Assuredly, if they correctly present the law of Texas as applied to the facts before this Court, on a question so constantly arising, they ought not to stand so pitifully alone.

THE ONLY ISSUE PROPERLY PRESENTED BY THE PETITION HEREIN STANDS UNCONTROVERTED

In the light of the uniformity and conclusiveness of all the authorities against any rightful claim of petitioner under the merits of this case under the finding of ambiguity and other findings made by the trial court upon petitioner's own evidence alone, which finding was not excepted to by petitioner as factually unauthorized nor questioned or repudiated by the Circuit Court of Appeals, it is obvious that neither affirmance nor reversal of the merely additional finding purportedly made by the Circuit

Court of Appeals and here protested by petitioner can in anywise help or injure either party hereto.

Respondents themselves, in their Reply to the Second Motion for Rehearing on remand (R. 383-387) urgently insisted that such finding when made, was merely presenting a controversial issue which petitioner could and would seize upon to endeavor to invoke the jurisdiction of this Honorable Court, though such finding was merely an additional finding to others wholly conclusive whether considered as a record title or an equitable title.

Even if there should be no authority to support such finding and even though it was made by the Circuit Court upon the misapprehension that the call for the W. H. Rogers line was a call for a line fixed by course and distance only and not by actual survey. So far as either have any application to this case, any ruling thereon stands as harmless against both parties, as the record stands. Every fact finding throughout the record shows petitioner never owned a title to the land in controversy.

WHEREFORE, Respondents pray that certiorari be denied.

Respectfully submitted,

ANGUS G. WYNNE,
Longview, Texas,
Attorney for Respondents B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers, Ola Mae Rogers, Elvie Rogers Waskom and Azzie Waskom.